PRISON ABUSE REMEDIES ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 4109

APRIL 22, 2008

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PRISON ABUSE REMEDIES ACT OF 2007

TUESDAY, APRIL 22, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:43 p.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Gohmert and Lungren.

Staff Present: Bobby Vassar, Subcommittee Chief Counsel; Rachel King, Majority Counsel; Mario Dispenza, (Fellow) ATF Detailee; Karen Wilkinson (Fellow) Federal Public Defender Office Detailee; Veronica Eligan, Professional Staff Member; Kimani Little, Minority Counsel; and Kelsey Whitlock, Minority Staff Assistant.

Mr. SCOTT. The Subcommittee will now come to order. I am pleased to welcome you to today's hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on H.R. 4109, the "Prison Abuse Remedies Act."

This is a follow-up of our hearing we held in November of last year entitled "Review of Prison Litigation Reform Act: A Decade of Reform Or an Increase in Prison Abuse?" That hearing began to look at some of the unintended consequences of the 1996 Prison Litigation Reform Act. The purpose of this hearing is to begin looking at how to address those problems.

While the PLRA has helped to decrease frivolous lawsuits, it has also in some cases made it nearly impossible for prisoners with meritorious claims to bring lawsuits in Federal court.

I will remind everyone that H.R. 4109 does not in any way amend the main aspect of the PLRA, the screening provision. The screening will continue to take place so that every case will be screened before it goes to Federal court. This will ensure that frivolous cases will not clog up the courts.

My bill will eliminate the most egregious problems with the PLRA. First, it will eliminate the physical injury requirement which currently excludes prisoners who have had their religious liberties violated or who are living in appalling conditions. In some cases it even excludes persons who have been raped if there is no technical, quote, physical injury from the assault.

Second, the bill will modify the exhaustion requirement, allowing prisoners and prison administration 90 days to work through the

administrative process instead of cutting off those prisoners who are unable to complete the administrative process, sometimes through no fault of their own.

Third, the bill will exclude juveniles from coming under the purview of the PLRA, because most juveniles simply cannot be expected to navigate the tricky aspects of the complicated statute.

Finally, the bill restores the attorneys' fees provision and the filing fees provision so that indigent prisoners filing under the act will be treated the same way as any other indigent person filing a lawsuit in Federal court.

I know that both sides of the aisle have been working hard on this issue to see if we can find some common ground. I remain hopeful that we will be able to make some progress this year at drafting a manager's amendment that will have the support of all the Committee Members.

I would like to give one example of how the unintended consequences of the act actually affect an individual prisoner. At the last hearing we heard from Garrett Cunningham, who had been raped by a prison guard in Texas. After the attack he was in shock and also afraid to report the attack for fear of retaliation. As a result, he did not exhaust all of his administrative remedies as required by the act, so he was not able to file a suit in Federal court.

Besides the exhaustion issue, rape victims are also barred in some courts because of the physical injury requirement. The PLRA requires that there be an actual physical injury, and some circuits have determined that rape is not a physical injury.

It is absurd to think that Congress intended to leave rape victims without access to Federal court, and along with many persons in Congress and in a bipartisan effort worked hard to pass the Prison Rape Elimination Act. That act formed a commission that is now investigating the prevalence of rape in Federal court. Given the concern that Congress expressed in passing that bill, it is contradictory to have in place a law that forecloses the opportunity for prisoners to seek redress once they have been harmed.

With that said, it is my pleasure to recognize the Ranking Member of the Subcommittee, Judge Gohmert.

[The bill, H.R. 4109, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 4109

To provide for the redress of prison abuses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 7, 2007

Mr. SCOTT of Virginia (for himself and Mr. CONYERS) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for the redress of prison abuses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Prison Abuse Remedies Act of 2007".

SEC. 2. SHOWING OF PHYSICAL INJURY NOT MANDATORY FOR CLAIMS.

(a) CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.—Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by striking subsection (e).

(b) TITLE 28.—Section 1346(b) of title 28, United States Code, is amended by striking paragraph (2).

SEC. 3. STAYING OF NONFRIVOLOUS CIVIL ACTIONS TO PERMIT RESOLUTION THROUGH ADMINISTRATIVE PROCESSES.

Subsection (a) of section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(a)) is amended to read as follows:

"(a) ADMINISTRATIVE REMEDIES.—

"(1) PRESENTATION.—No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

"(2) STAY.—If a claim included in a complaint has not been presented as required by paragraph

(1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

"(3) PROCEEDING.—Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved.".

SEC. 4. EXEMPTION OF JUVENILES FROM PRISON LITIGATION REFORM ACT.

(a) TITLE 18.—

(1) JUVENILE PROCEEDINGS.—Section 3626(g) of title 18, United States Code, is amended—

(A) in paragraph (3) by striking "or adjudicated delinquent for,"; and

(B) so that paragraph (5) reads as follows:

"(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains prisoners;".

(2) ADULT CONVICTIONS.—Section 3626 of title 18, United States Code, is amended by adding at the end the following:

"(h) EXCLUSION OF CHILD PRISONERS.—This section does not apply with respect to a prisoner who has not attained the age of 18 years.".

(b) CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.—

(1) Section 7(h) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(h)), is amended by striking "or adjudicated delinquent for,".

(2) Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by adding at the end the following:

"(i) EXCLUSION OF CHILD PRISONERS.—This section does not apply with respect to a prisoner who has not attained the age of 18 years.".

(c) TITLE 28.—Title 28, United States Code, is amended—

(1) in section 1915(h)—

(A) by inserting "who has attained the age of 18 years" after "means any person"; and

(B) by striking "or adjudicated delinquent for,"; and

(2) in section 1915A(c)—

(A) by inserting "who has attained the age of 18 years" after "means any person"; and

(B) by striking "or adjudicated delinquent for,".

SEC. 5. MODIFICATION OF BAN ON MULTIPLE IN FORMA PAUPERIS CLAIMS.

Section 1915(g) of title 28, United States Code, is amended—

(1) by inserting "within the preceding 5 years" after "3 or more occasions"; and

(2) by striking ", malicious, or fails to state a claim upon which relief may be granted" and inserting "or malicious".

SEC. 6. JUDICIAL DISCRETION IN CRAFTING PRISON ABUSE REMEDIES.

Section 3626 of title 18, United States Code, is amended—

(1) in subsection (a)(1), by striking subparagraphs (A) and (B);

(2) in subsection (a)(2)—

(A) by striking "and shall respect the principles of comity set out in paragraph (1)(B)"; and

(B) by striking the final sentence;

(3) in subsection (b)(1)(A), by inserting "if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur" after "intervenor";

(4) in subsection (b)(1)(B), by adding at the end the following: "Nothing in this section shall prevent the court from extending any of the time periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer than those time periods.";

(5) by striking paragraphs (2) and (3) of subsection (b);

(6) in subsection (b)(4), by striking "or (2)";

(7) by striking paragraph (1) of subsection (c); and

(8) by striking paragraphs (2), (3), and (4) of subsection (c).

SEC. 7. RESTORE ATTORNEYS FEES FOR PRISON LITIGATION REFORM ACT CLAIMS.

Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by striking subsection (d).

SEC. 8. FILING FEES IN FORMA PAUPERIS.

Section 1915(b)(1) of title 28, United States Code, is amended—

(1) by striking "or files an appeal"; and

(2) by inserting "and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(c)(1))," after "in forma pauperis,".

SEC. 9. TECHNICAL AMENDMENT TO RESOLVE AMBIGUITY.

Section 1915(a)1) of title 28, United States Code, is amended by striking "that includes a statement of all assets such prisoner possesses" and inserting "(including a statement of assets such person possesses)".

○

Mr. GOHMERT. Thank you, Chairman Scott. And I do want to thank you for the opportunity here today. This is the second hearing we have had on the subject of prison litigation. During the first hearing we had a general discussion on the subject of prison litigation; however, at that time neither the Members of this Subcommittee nor the witnesses had the opportunity to review the provisions of H.R. 4109, the "Prison Abuse Remedies Act."

Now that we have had an opportunity to examine the bill, we believe that if it were passed in total, it would repeal every meaningful protection of the Prison Litigation Reform Act, or the PLRA. The proposed legislation would cause an explosion of frivolous prisoner litigation that would clog up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens.

In 1996, Congress took appropriate steps to limit frivolous prisoner litigation by passing the PLRA. It was passed on a bipartisan basis to address legitimate concerns about excessive prisoner litigation. Our colleague on the Subcommittee, Representative Dan Lungren of California, was a leader in that effort.

Prior to the enactment of the PLRA, the National Association of Attorneys General estimated the cost of frivolous prisoner lawsuits at more than $80 million per year. At that time prisoners filed a disproportionate share of the civil lawsuits filed in Federal courts. In 1994, only 2 years before the PLRA was passed, about 25 percent of the lawsuits were filed by prisoners, who made up less than 1 percent of the population. Most of these cases were dismissed without merit, but that in and of itself takes a tremendous amount of work, for anybody who has worked in the courts, around the courts, or know what is involved to get to that point of dismissal without merit.

But this avalanche of litigation drew the concern of the judiciary. As Justice Robert Jackson observed many years earlier, this clogging of the Federal courts with frivolous cases, quote, prejudiced the occasional meritorious application to be buried in a flood of worthless ones, unquote.

Another distinguished jurist, Judge Harvey Wilkinson of the Fourth Circuit, called on Congress to address frivolous litigation in 1994. Judge Wilkinson noted that the contemporary legal system invites prisoners to sue, and that, quote, that the Supreme Court has lamented that these petitions often result in the squandering of judicial resources with little offsetting benefit to anyone.

Congress responded to these calls for action and passed the PLRA. As enacted, the PLRA takes commonsense steps to reduce the number of petitions filed by inmates claiming violations of their rights. Under the PLRA, inmates are, number one, required to exhaust all administrative remedies before filing a case in Federal court; number two, prohibited from receiving filing fee waivers if they have a history of filing frivolous or malicious lawsuits; and three, had to demonstrate physical injury to claim monetary awards for compensatory damages. Now, in this bill, each one of these commonsense provisions is basically repealed or made ineffective. These provisions are made ineffective despite the fact that evidence shows that the PLRA worked in decreasing the amount of frivolous prisoner litigation. And I don't use the term "frivolous"

lightly, because I know, as a former judge and chief justice, there were many times the plaintiff's bar has gotten a bad rap over what many call frivolous lawsuits when, in fact, they were lawsuits that narrowly lost at a jury trial, in which case there was evidence to support both sides, and one side lost. I don't consider those frivolous.

What I am talking about here truly are frivolous cases. I have seen them firsthand. Now, according to the records kept by the administrative offices of the Federal courts, in 1995, the year before the PLRA passed, over 41,000 cases were filed by Federal prisoners alleging violations of their civil rights. Since that high mark, the number of cases has dropped to about 24,000 cases per year. This marked decrease occurred because the PLRA kept the frivolous cases off the court dockets.

Supporters of the H.R. 4109 state the PLRA needs to be amended because it has prevented inmates by vindicating their rights by raising legitimate claims. More than 24,000 lawsuits filed per year is hardly evidence of an inability to pursue claims. However, I expressed at the prior hearing and I think Members are willing to make adjustments to the provisions of PLRA where there appears to have been injustice.

During the first hearing our Members identified three areas where some limited amendments to the PLRA may be appropriate; one where prisoners who were victims of sexual assault, including forced oral sex, should be allowed to pursue nonetheless a lawsuit, and that some Federal circuit courts already allow these suits. We want to see that they do. Second, prisoners who allege violations of their rights to free exercise of religion should also be allowed to pursue suits. Third, prisoners who filed administrative complaints at correction facilities should be protected from retaliation by correction officials.

We agree on those things. That is important. These are commonsense fixes that should properly balance the rights of prisoners seeking judicial redress, the society's legitimate concern for good management of its prisons, and efficient operations of the court.

I look forward to working with Chairman Scott on finding a way to ensure that we do not return to a time when the wheels of justice came to a crawl because court dockets were clogged with these kinds of frivolous suits. And we don't want to ever see a case where resources are taken from other places where they are needed, where they are dealing with the ill, the infirm, our senior citizens, and having to be put into the courts so that they can address a mass of frivolous claims.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

We are joined by the Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Scott. I am pleased to join a distinguished panel here of Members, a former State attorney general, a former chief justice of the State courts, and a distinguished counsel from North Carolina, long-serving Member of the Committee. I think that these five witnesses will help us put into perspective the kinds of changes that are being suggested to the Prison Litigation Reform Act. One is for the juveniles to have ac-

cess to the courts to address abuse. Reasonable. Two, we want to remove the current requirement of a physical injury before an inmate has a right to seek judicial review of a complaint. Reasonable. And finally, the removal of procedural technicalities that result in the mandatory dismissal of meritorious claims.

And so I would like to see and listen carefully to the remedy of the distinguished Members of Congress that are on this Crime Subcommittee in the Judiciary as to how we go about that.

Juveniles that are abused in prison have a safe way to complain and seek judicial help, or they ought to have a safe way. This isn't provided under current law. Juveniles are the most abused of inmates. When a child is raped or sexually abused by a prison guard, current law requires him to follow a rather complicated set of procedures that often involves the filing of a complaint with the very guard that abused him or her. Frequently out of fear or lack of skill, the juvenile doesn't file a proper complaint. The Prison Abuse Remedies Act will remove juveniles from the reach of the Prison Litigation Reform Act, which has in some cases set up unsurmountable obstacles for juveniles.

The second part, number two, this reform act eliminates the need to show physical injury in order to sue for compensatory damages. In the last few years, courts have had to dismiss meritorious cases because there has been no physical injury.

A case in point, female inmates challenged the use of strip searches by male guards. One woman was so traumatized, she attempted to take her life. The court had no choice but to dismiss the case under existing law because there was no demonstrable physical injury.

Prisoners who complain of sexual assaults that leave no marks, confinements under inhumane conditions, deprivations of religious freedom, and psychological assaults are frequently denied; these cases are denied access to Federal court because no one can point to physical injury. And so we correct the problem.

And, finally, the bill eliminates the high procedural bars that have stopped meritorious claims because under the existing law, it requires inmates to attempt to resolve their problem within the prison system before seeking judicial remedies. Many prison grievance procedures, however, have short deadlines, and so the inmates can't handle and navigate through all this without a lawyer, and their cases get dismissed.

So I am happy to join my colleagues at this important hearing. I look forward to hearing from our distinguished panel of witnesses.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

I want to talk about three parts of the Prison Abuse Remedies Act that I consider critical.

1. The ability for juveniles to have access to the courts to address abuse;
2. The removal of the current requirement of a physical injury before an inmate has a right to seek judicial review of a complaint; and

3. The removal of procedural technicalities that result in the mandatory dismissal of meritorious claims.

First, I want to make sure that juveniles who are abused in prison have a safe way to complain and seek judicial help. Current law does not provide this. Juveniles, children, are the most abused inmates. When a child is raped or sexually abused by a prison guard, current law requires him to follow a complicated set of procedures that often involves filing a complaint with the very guard that abused him. Out of fear or lack of skills, or both, the juvenile does not file a complaint. The Prison Abuse Remedies Act will remove juveniles from the reach of the Prison Litigation Reform Act, which has set up these unsurmountable obstacles for juveniles.

Second, the Prison Abuse Reform Act eliminates

the need to show physical injury in order to sue for compensatory damages. In the law few years, courts have had to dismiss meritorious cases because there has been no physical injury. In one case, female inmates challenged the use of strip-searches by male guards. One woman was so traumatized she attempted suicide. The court had no choice but to dismiss the case under existing law because there was no physical injury.

Prisoners who complain of sexual assaults that leave no marks, confinement under inhumane conditions, and deprivations of religious freedom currently are denied access to federal court because they can point to no physical injury. This bill corrects this problem.

Third, the bill eliminates the high procedural bars that have stopped meritorious claims. Existing law requires inmates to attempt to resolve their problem within the prison system before seeking judicial remedies. Many prison grievance procedures, however, have short deadlines, unclear rules, and complicated procedures. Most inmates cannot navigate these complicated rules without the help of a lawyer.

Instead of dismissing a case on technical grounds, the Prison Abuse Remedies allows the Court to stay a case for 90 days so that an an inmate can present his problem to prison officials.

Allowing these lawsuits in appropriate circumstances will not open the floodgates to frivolous litigation, but rather will send the message that our prisons, whether run by public or private institutions, must respect fundamental constitutional rights consistent with the protection of inmates and prison personnel and the maintenance of prison security. I look forward to hearing our witnesses discuss these and other issues.

Mr. SCOTT. We are joined by the gentleman from California, who I understand has a statement.

Mr. LUNGREN. Thank you very much, Mr. Chairman. Thank you for allowing me to offer a few comments on the Prison Litigation Reform Act and the suggested changes contained in your bill.

This is an issue which has been a real interest to me for some time. As was mentioned previously, in my capacity as the attorney general of the State of California, I was the Chair of the Criminal Law Committee of the National Association of Attorneys General, and my office at that time worked, and I worked personally, with then-Governor Tom Ridge of Pennsylvania, Senator Spencer Abraham of Michigan, Harry Reid of Nevada and Jon Kyl of Arizona to write the Prison Litigation Reform Act.

And so it is from this vantage point as a former State official who was in charge of a department that spent, I believe, at the time I was attorney general, $8 million a year just on prisoner litigation, at a time when the ninth circuit did their own study of the issue of prisoner litigation, and in their report I believe said that 99 point something percent of the cases filed in the ninth circuit were ultimately dismissed, or, if they went to a hearing, were at that point in time found to be without merit; 99 point something percent. That sounds to me to be frivolous lawsuits. So I have some concerns that any significant departure from our response to that

problem could reverse the progress we have made in reducing frivolous prisoner lawsuits.

My concern is not driven by lawsuits over broken cookies or the emotional distress caused by inmates because of the requirement that they be seated next to criminals. Those are just two examples of the lawsuits that we had to answer for, spend time going to court on before we had relief that has been delivered by the PLRA. But at the heart of the matter, it seems to me, is we have an obligation to victims of crime not to provide those who have harmed them with legal weapons that make a mockery of the notion of punishment.

You know, I think it is important to state the obvious. Those who inhabit our Nation's prisons are criminals, and they are there because they have been found to have violated the rights of their fellow citizens. So I hope we keep this in mind to avoid the mistake of following into emotionally satisfying rights talk with respect to prisoners.

It is, in my judgment, a mistake of categories to confuse the rights of a convicted murderer or rapist with those of a criminal defendant who is appropriately clothed with the presumption of innocence until his or her fellow citizens conclude that the facts will determine otherwise.

As Judge Easterbrook pointed out in *Johnson v. Daley*, it is a false notion that prisoners and free persons have similar constitutional rights; however, this is not to suggest that the prisoners are not without the protection of the law. For the subservient relationship of prisoners to the State, which has no counterpart with respect to free persons, it, in itself, gives rise to legal obligations by the State. Punishment for a crime carries penalties contained within the law and should not entail retribution against inmates outside the parameters of duly enacted statutes. I think that is something on which we can all agree.

It is for that reason that I share the sentiments expressed by Pat Nolan of the Prison Fellowship, contained in a statement of November 8 of last year. It is entirely appropriate and even necessary, I believe, for this Committee to communicate in clear and unequivocal terms that the personal injury requirement should not bar recovery in sexual assault cases with respect to mental or emotional injury claims. And it is my hope that we can craft language to address any uncertainty that may exist concerning this issue.

Furthermore, in our consideration of exhaustion, it seems to me that we should be able to take care of the problem mentioned by everybody of the possibility of intimidation, which renders it impossible for an inmate to be able to utilize the State proceedings. But it seems to me in consideration of legislative changes, it is also necessary for us to consider the need to address what are clear circumventions of the intent of the act.

An issue has arisen relating to the United States Supreme Court's decision in *Jones v. Bock*, indicating that exhaustion must be raised as an affirmative defense. The Court made clear that this is something for us, the Congress, to address. It seems to me there is no reason to make exhaustion a jury question and wait until the end of the trial to resolve the issue. So on the one hand, it seems to me we can craft language to take care of the problem of intimi-

dation and not have exhaustion as an excuse which allows intimidation to be protected. We also ought to deal with the issue of exhaustion as an affirmative defense.

The attorneys' fees provisions that have been mentioned have been circumvented where former prisoners have filed lawsuits for civil rights violations even under circumstances where they have filed on behalf of inmates still serving prison sentences. Lawsuits under the Federal law relating to prison conditions have also been held not to be subject to the existing attorney fee provisions of the act.

It seems to me this is something we ought to take a look at where former inmates may bring a 100-count lawsuit on behalf of prisoners serving their sentence, and where the plaintiffs prevail on 1, fail on 99, and collect attorneys' fees outside of the scope of the PLRA for all 100 counts.

Under current law, prospective relief means all relief other than compensatory monetary damages. Such prospective relief is subject to the limitations of PLRA. For example, such relief may be narrowly drawn, extend no further than necessary, and be the least intrusive course of action. Prospective relief can include things ranging from injunction, a declaratory judgment, or even punitive damages. In some jurisdictions the courts have not deemed nominal damages, recovery of a dollar, to be subject to the limitations of the PLRA, and as a consequence, we have had cases where there is no real injury. Someone was denied the use of a book for 1 hour. That is an actual case. These cases are brought where there is no justification for the use of Federal court resources, much less that of State officials.

So it just seems to me—and I have seen this, and I know some people don't like to realize this, but sometimes some prisoners use litigation as a form of recreation. There is little encumbrance to the abuse of the judicial system, and as a result, when it encumbers the judicial system, legitimate claims of prisoners who have been abused get overwhelmed and sometimes pushed to the end of the line.

So I just hope we can work together in a bipartisan spirit, Mr. Chairman, to deal with those issues that I think have legitimacy and that we can have agreement on, but at the same time not undercut what I think the value of the Prisoner Litigation Reform Act provided us, and that is ridding us of the frivolous lawsuits that were in the vast majority of cases. And when it is 99 percent by the number—by the count of the ninth circuit, it seems to me that fits the definition of frivolous.

And I thank the Chairman for granting me his indulgence for this time.

Mr. SCOTT. Thank you.

The gentleman from Michigan.

Mr. CONYERS. Mr. Chairman, if I might just make a note. I had visiting me a distinguished minister from Tennessee, the Reverend Ben Cox, who I can remember when he was a Freedom Rider and a religious leader. He is still very active, and I just wanted to know that he was—that the record would show that he was in our hearing today.

Mr. SCOTT. Thank you very much. It is good to see you.

We have a distinguished panel of witnesses here today to help us consider the important issues currently before us. Our first witness is Stephen Bright, who is the president and senior counsel for the Southern Center for Human Rights in Atlanta, where he has been a nationally recognized leading advocate for human rights regarding prisons and jails in the South for over 25 years. He also teaches at Yale Law School and previously taught at law schools at Harvard, Georgetown, Emory and other universities. He received the American Bar Association's Thurgood Marshall Award in 1998.

Our second witness will be Judge John J. Gibbons, founder of the Gibbons Firm's John J. Gibbons Fellowship in Public Interest and Constitutional Law. He is a former chief judge in the United States Court of Appeals for the Third Circuit where he served from 1970 to 1990. He is the past president of the New Jersey State Bar Association, life member of the American Law Institute, and fellow of the American Bar Foundation.

Next witness will be Sarah V. Hart; currently works for District Attorney Lynne Abraham in Philadelphia. She has worked for almost three decades in criminal justice at the Federal, State and local levels. From 1979 to 1995, she served as a prosecutor in Philadelphia, during which time she testified before Congress about the Philadelphia prison cap case and assisted Congress as a drafter of the PLRA and its 1997 amendments. From 1995 to 2001, she served as chief counsel for the Pennsylvania Department of Corrections, where she successfully defended the PLRA in Federal court. After her stint as a visiting professor at Rutgers, she returned to the Philadelphia DA's office.

Our next witness will be Ernie Preate; began his legal career as a district attorney in Lackawanna County in 1977 until 1989. In 1989, he took office as the Attorney General of Pennsylvania. In 1995, his life changed forever when he pleaded guilty to mail fraud and served a year in prison. His year in prison changed his views on the criminal justice system, and after returning to legal work, he has primarily worked as a lobbyist working for Enlightened Public Policy and has represented many public interest clients.

And our last witness will be Ms. Jeanne Woodford, who began her career in corrections in 1978 following her graduation from Sonoma State University with a B.A. in criminal justice. She has utilized her education and experience to become a leader in the field of corrections for over 30 years. She served as warden at San Quentin prison in California, and in 2004 became the director of the Department of Corrections, the largest correctional system in the United States. Currently she is the chief of the San Francisco Adult Probation Department.

Our witnesses will begin. I would appreciate it if you would confine your testimony to 5 minutes. Your complete statement will be made part of the record in its entirety, and there is a lighting device which will start on green, go to yellow when 1 minute is left, and will go to red when the 5 minutes are up.

Mr. Bright.

TESTIMONY OF STEPHEN B. BRIGHT, SOUTHERN CENTER FOR HUMAN RIGHTS, ATLANTA, GA

Mr. BRIGHT. Mr. Chairman, Members of the Committee, thank you very much. It is an honor to be here.

I want to start just by telling you that my problems with both the exhaustion requirement and with the application of this act of juveniles can be summarized by a case of a young man, Stephen Z., who was sent to a juvenile facility for theft. He was initiated when he got there by being jumped and beaten by a number of inmates until he had a seizure. That was one of four beatings that he had the first year that he was in this facility, four. Now, one of them was a rape, but the other three were not. This is not just sexual assaults we are dealing with here. The child was so upset about this he was put on suicide watch because he was about to take his life rather than deal with this. That was all in 2002. The next year he was beaten with socks, but with padlocks in them; again, severely beaten.

Now, he didn't file a grievance for this reason: The practice in this facility was to handcuff one inmate to another and then have other inmates beat him while he was handcuffed. The officials knew these things were going on. I want to make that clear in terms of notice to the facility. Some of these wounds he had had to be surgically stitched up. There was no secret about this.

His mother complained to the facility, wrote to two juvenile court judges. One judge wrote the Governor. She arranged to see the superintendent of the facility. This mother is desperate to talk about what is happening to her child. So everyone knows what is happening. The grievance procedure, five steps; and the first step, 2 days. And I just ask you, if anybody is seriously interested in knowing about grievances, to do something about them when you have got a statute of limitation of 2 days. We give a lawyer in a personal injury lawsuit 2 years to file a lawsuit, and we expect children, mentally ill people, mentally retarded people, illiterate people to file within 2 days. It was five steps of a bunch of appeals and all that.

The Justice Department later said this was a completely dysfunctional system. The court said despite the heroic efforts of this mother to protect her child, she didn't comply with the exhaustion provisions of the Prison Litigation Reform Act. They had to be filed by the child himself, not by his mother. They had to be filed within 2 days. So that is the law today.

You can take this other, Chad Benfield, raped in the South Carolina prison, once so severe that he was hospitalized. Again, everybody knew this man was raped. He was hospitalized for it. He begged for protective custody. Again, everybody knows this happened. He attempted suicide because of what was happening. And he thought that he couldn't file a grievance for being raped. First of all, he was transferred from one prison to another. He was also raped in the second prison. His sort of common sense understanding was, when I got sent to another prison, I couldn't file a grievance on what happened in the first prison.

Secondly, the grievance procedure couldn't give him damages for what happened to him. So his commonsense thought of it was that he didn't have a grievance to file.

Common sense has nothing to do with the system that we have created. It is a system of all sorts of complicated procedures and technical requirements that exist for the purpose of tripping people up so they can't bring a lawsuit. Now, we have just got to be candid about that. One case that we had, the grievance was thrown out because the grievance was written outside the margins on the form. One that I filed myself on behalf of a client was dismissed because it had to be filed by the inmate himself, not by his lawyer.

We are treating these grievance systems, which are set up by the people who are going to be sued, as if they are some sort of habeas corpus system. Of course there you have a year, a 6-month statute of limitations, you have lawyers who at least can try to comply.

I represent all the inmates at the jail in Atlanta. We have begged them to set up a grievance system to deal with things like a young man who is handcuffed behind his back and an officer shoots him with a taser while he is sitting there completely defenseless. There are things like that happening in this jail, and we would like for people to be able to file grievances. The system is that most of the time you can't find a form. When you can, you can't find a person to take it. When you file it, maybe half the time you will get back a response saying it has been denied, and the other half of the time you won't get back a response at all. Now what does the prisoner do, file a mandamus with the warden because nobody has responded to his grievance?

If we are going to have these sort of hypertechnical requirements, we need to put lawyers in these prisons because I will tell you, most lawyers can't follow these. And it may be that in some parts of this country, there are grievance systems which work and which are not to trip people up, but are to find out what is going on in the facilities, but I will tell you, where I practice, these are Mickey Mouse proceedings, kangaroo courts that exist for the purpose of tripping people up. And I have been at meetings where people very candidly admitted that.

I was begging the sheriff in this case, please set up a grievance system. And the county attorney said, yes, if you would set up a grievance system, we could defeat these lawsuits they keep filing because nobody would probably comply with them.

Let me just say a quick word about physical injury. I think everybody was offended by what happened in Abu Ghraib. Most people don't know you couldn't file a lawsuit for it in the United States under the Prison Litigation Reform Act. There is no physical injury. We had a very similar lawsuit in the prison in Georgia where the guards rampaged through the prison, stripped people naked in front of women people, had them tap dance, hold one leg in their hand, and stand on one foot, hold the other foot in their hand, switch back and forth as fast as they could, all this sort of degradation and humiliation. The tenth circuit said that that is not actionable because there was no physical injury for what happened there. You know, cases where people have been sodomized, they said there was no physical injury in this particular case.

I just want to say this real quickly. You have a prison population with a very large number of mentally ill people, mentally retarded people, illiterate people, people have nothing to do because there are no educational programs, no vocational programs, people have

no understanding of the legal system because there is no access to anybody who can give them any legal advice, and all you have to have is a legal pad and piece of paper, and you can write on it and send it to the court. Now, that is the lawsuits about cookies breaking and peanut butter that everybody wants to make so much about, and as long as you have a high population of mentally ill people and people of limited intelligence in our prisons, you are going to get some of those. But let me tell you, what this act is doing is for the rare people—and most people don't have lawyers. They don't have access to a lawyer. You could change the attorneys' fees and give people all the attorneys' fees in the world; lawyers are not going to want to go to some remote part of the State, put up with all the delay and everything to get to see a prisoner to find out there is probably no lawsuit there anyway because they didn't file their grievance on time or the person is inarticulate or mentally ill, whatever.

All I am saying is, these are legitimate lawsuits. They are people that are grievously injured in violation of our Constitution and our laws. And if we want to have the Constitution apply in the prisons, and if we don't want to go back to an era which I think we are where people are chained to desks and chained to chairs and not allowed to even go to the bathroom, those kinds of suits are being dismissed as a result of this provision. Thank you.

Mr. SCOTT. Thank you, Mr. Bright.

[The prepared statement of Mr. Bright follows:]

PREPARED STATEMENT OF STEPHEN B. BRIGHT

I appreciate the opportunity to address the Subcommittee on insuring that the Constitution and the rule of law apply in the prisons and jails in this country.

I have been concerned about this issue since bringing suit in 1976 on behalf of people confined in deplorable conditions in a small county jail in Kentucky. More recently I have been counsel in two cases, both involving the same large metropolitan jail, the Fulton County Jail in Atlanta, regarding failure to provide people being held there with life-sustaining medical care and failure to protect them from life-threatening assaults, as well as other issues, such as the jail's failure to release people when there was no longer legal bases for holding them. One of those cases is ongoing.

In the last 25 years as an attorney at the Southern Center for Human Rights, I am and have been involved in many other cases concerned with patently unconstitutional conditions and practices in prisons and jails throughout the South. The Center is a non-profit public interest program, which receives no government funds and is thus not prohibited from responding to some of the most urgent and compelling violations of the Constitution of the United States in this country.

Unfortunately, we are able to respond to only a very small percentage of the pleas we receive each day from people in prisons and jails and their families. We are concerned about some provisions of the Prison Litigation Reform Act—such as the exhaustion requirement, the physical injury requirement, the Act's application to children, and the limits on the power of the federal courts—because these provisions often result in denying justice to people who deserve it.

Much of the support for the PLRA was based on arguments that demonized prisoners and trivialized their concerns. However, the men, women and children who are incarcerated in this country are not members of a faceless, undifferentiated mass unworthy of protection of the law. They are individuals, who vary considerably in the crimes they have committed, the lives they have led, their potential to be productive members of society, and their commitment to lead useful and productive lives. Most of them will return to society. They have families and friends who care about their safety. A significant number are mentally ill, have limited intellectual functioning, are addicted to substances or have a combination of these features.

In this very large population, there are some who, without educational or vocational programs or access to legal advice, attempt to file their own lawsuits, some of them quite misguided. But the issues that we address on their behalf are of fun-

damental importance to their lives, safety, and dignity. For example, we have brought cases on behalf of—

- HIV-positive men housed in a warehouse. Some suffered from pneumonia, which went untreated until they drowned in their own respiratory fluids. Others stood in long lines in the middle of the night to get pills they took on empty stomachs. When they took the pills, they vomited. Some died from starvation despite begging for food.
- Children convicted as adults who were raped when housed with older prisoners. One youth, Wayne Boatwright, who was just 18, was choked to death by three other inmates as they raped him. The prison failed to protect him despite pleas to the prison officials by the young man, his mother and grandmother to protect him from being raped. Other inmates at the same prison were bashed in the face and head with steel padlocks inside socks, broomsticks, trash cans, metal door plates and handmade knives.
- A woman who woke up with blood spurting from her neck because a mentally ill inmate slashed her from ear to chin with a razor as she slept. A single correctional officer had been assigned to supervise 116 women sleeping in bunk beds crowded into one huge room. Sometimes a single officer was responsible for the safety of 325 women in four dorms.
- A man put in four-point restraints and left there for days without being allowed to go to the bathroom.
- Men forced to sort through garbage on a conveyer belt containing hepatitis- and AIDS-infected needles and other medical waste without protective clothing at a "recycling" plant within a prison. One of many resulting injuries was permanent injury to a man's eye after a piece of glass flew into it.

These are not trivial matters. But the exhaustion requirement of the PLRA bars access to the federal courts for even the most egregious violations of the Constitution if people held in prisons and jails do not comply with the hyper-technical requirements of complicated grievance systems—some of them procedural mazes which would challenge many lawyers. People who are mentally ill, mentally retarded, or illiterate may be unaware of the two or three deadlines that may apply at various stages of the process, unable to find the right form to fill out or the right person to give it to, and unaware of what to do if no action is taken on the grievance for weeks or months.

Recovery for even the most degrading treatment—even the universally condemned practices at Abu Ghraib—is barred if there is no physical injury. A federal court threw out a suit we brought for such conduct.

Beyond that, we waste a lot of time and precious judicial resources litigating questions of whether inmates have complied with every last stage of grievance processes, were capable of doing so, were prevented from doing so by prison officials and other collateral issues, as well as questions such as whether a sexual assault or lack of care leading to a stillbirth constitutes a "physical injury" under the PLRA.[1]

I would like to address the exhaustion requirement, the physical injury requirement and the application of the PLRA to juveniles.

I. THE PLRA EXHAUSTION REQUIREMENT SHOULD BE MODIFIED SO THAT TECHNICAL PROBLEMS WITH PRISONERS' GRIEVANCES DO NOT FOREVER BAR JUDICIAL REVIEW.

The exhaustion requirement of the Prison Litigation Reform Act[2] has been interpreted not only to require prisoners to present their claims to prison officials before filing suit, but also to bar claims if inmates fail to comply with all of the technical requirements of the prison or jail grievance systems.[3] Grievance systems usually have two or three levels of review—for example, an inmate may be required to seek an informal resolution by a certain deadline, file a formal grievance within a specified deadline if the problem cannot be resolved informally, and file an appeal within

[1] *See, e.g., Hancock v. Payne,* 2006 WL 21751 at *3 (S.D. Miss. 2006) (concluding that "bare allegation of sexual assault" does not satisfy physical injury requirement); *Liner v. Goord,* 196 F.3d 132, 135 (2d Cir. 1999) (concluding that "the alleged sexual assaults qualify as physical injuries as a matter of common sense"); *Pool v. Sebastian County,* 418 F.3d 934, 943 n.2 (8th Cir. 2005) (noting assertion that no physical injury resulted from failure to care for pregnant woman leading to delivery of stillborn baby); *Clifton v. Eubanks,* 418 F. Supp.2d 1243 (D. Colo. 2006) (concluding that improper medical care leading to stillbirth constituted physical injury).

[2] 42 U.S.C. § 1997e(a)(2008) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

[3] *Woodford v. Ngo,* 126 S.Ct. 2378 (2006).

yet another deadline if the formal grievance is denied. The deadlines in some systems are as short as three to five days.

Thus, while an attorney who has been trained in the law may have two years under the applicable statute of limitations to file an lawsuit in an automobile negligence case, a prison system may give people who are mentally ill, illiterate or of limited intelligence just five days to file their grievances or be forever barred from seeking vindication of their rights in court.

The exhaustion provision of the PLRA puts the potential civil rights defendants in charge of defining the procedural hurdles that a prisoner must clear in order to sue them. This produces a perverse incentive for prison officials to implement complicated grievance systems and require hyper-technical compliance with them in order to shield themselves from prisoners' lawsuits. That has become the main purpose of many grievance systems.

I once helped a client complete a grievance form and dropped it off with a deputy warden on my way out of the prison to be sure it was filed within the five-day deadline. Nevertheless, it was denied because a rule required that *the inmate* file the grievance. As I said previously, the hyper-technical requirements of the grievance systems pose a challenge even to attorneys.

In another case, an inmate was beaten with a sock full of combination locks. Filing a grievance was not the first thing on his mind during the five days he had to file one—he was in and out of consciousness during that time. Nevertheless, it was argued that he could not file suit because of his failure to comply with the deadline.

Other trivial technical defects like using the wrong form, directing a grievance to the wrong person, or filing the wrong number of copies all could bar prisoners' claims from court.[4] Inmates may not be able to obtain the required forms—or even pencils with which to fill complete them. They may not be able to give grievances to the designated persons or may be afraid to do so for fear of retaliation. Even when an inmate files within the deadline, in some situations no action is taken on the grievance.

A prisoner who learns upon filing suit that she has failed to comply with prison rules cannot simply return to court after filing the appropriate forms and comply with the rules. By the time a court determines that a claim is procedurally defaulted under the PLRA exhaustion provision, the deadline for using the prison grievance system will be long past.

Gravely serious claims are dismissed for failure to comply with grievance procedures. For example, a prisoner's suit alleging that he had been beaten and seriously injured by guards was dismissed for failure to comply with a grievance procedure that required an attempt at informal exhaustion within two days and the filing of a grievance within five days.[5] The prisoner said that he had been placed in segregation after the beating, and that the officers had not given him grievance forms. Another suit alleging repeated rapes by other inmates was dismissed for failure to timely exhaust; the inmate who sought to file the suit said that he "didn't think rape was a grievable issue."[6] A prisoner who had been beaten by other inmates maintained that he had failed to file a grievance within the 15 days required because he had been hospitalized; the magistrate judge recommended staying the case for 90 days to allow him to exhaust (as the amendment in the Prison Abuse Remedies Act would permit), but the district court dismissed the case instead.[7]

These are not isolated examples.[8] And they do not begin to tell how many cases are not brought because it is clear that they will be dismissed for failure to comply with grievance procedures.

The Prison Abuse Remedies Act would correct this problem by allowing federal courts to stay proceedings for up to 90 days to permit prisoners to exhaust administrative remedies. Prison officials would have had an opportunity to resolve such complaints, but they would not be able to dodge accountability by asserting inmates' failure to comply with complex and technical requirements.

The argument that the PLRA need not be amended because courts can simply conclude that administrative remedies are not "available" within the meaning of the statute simply ignores reality. Grievance procedures may be "available" in a legal,

[4] *See* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act,* http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf at 8 (March 2007).

[5] *Latham v. Pate,* 2007 WL 171792 (W.D. Mich. 2007).

[6] *Benfield v. Rushton,* 2007 WL 30287 (D.S.C. 2007).

[7] *Washington v. Texas Department of Criminal Justice,* 2006 WL 3245741 (S.D. Tex. 2006).

[8] For other cases dismissed for failure to exhaust, see Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction—Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA),* 29 CARDOZO L. REV. 291, 321 (2007).

technical sense, but they are too complicated for most prisoners to comply and they are strictly enforced to avoid justice rather than obtain it.

It is reasonable to require a prisoner to inform the authorities of a violation of rights so that officials may promptly deal with it. But that can be accomplished by requiring a statement to a warden within a reasonable time. The officials in charge of the system should be responsible for forwarding complaints to the various levels of review if they want to have such a system. But they should not be encouraged to impose upon prisoners procedural requirements more complex and demanding than the legal system requires of attorneys. That is what the PLRA does now and why the exhaustion requirement should be repealed.

II. THE PLRA'S PHYSICAL INJURY REQUIREMENT BARS RECOVERY FOR DEGRADING AND DEHUMANIZING ABUSE OF PRISONERS, AND IT SHOULD BE REPEALED.

People in this country and around the world were horrified by images of Abu Ghraib, as undoubtedly were all the members of this Subcommittee. What few people know is that if such conduct occurs in a prison or jail in this country, those subject to it would have no redress in the federal courts due to the "physical injury" requirement of the PLRA.[9]

We had such a case. Officers who hid their identity by not wearing or by covering their badges rampaged through a prison—swearing at inmates, calling some of them "faggots"; destroying their property; hitting, pushing and kicking them; choking some with batons; and slamming some to the ground. The male inmates were ordered to strip and subjected to full body cavity searches in view of female staff. Some were left standing naked for 20 minutes or more outside their cells, while women staff members pointed and laughed at them. Some were ordered to "tap dance" while naked—to stand on one foot and hold the other in their hands, then switch, and rapidly go from standing on one foot to the other. The Court of Appeals for the Eleventh Circuit held that this conduct did not satisfy the physical injury requirement of the PLRA.[10]

Other courts have found the physical injury requirement was not satisfied by

- a "bare allegation of sexual assault" even where male prisoners alleged that a corrections officer had sexually assaulted them repeatedly over a span of hours,[11]
- prisoners being housed in cells soiled by human waste and subjected to the screams of psychiatric patients,[12]
- a prisoner being forced to stand in a 2½ foot wide cage for 13 hours, naked for the first 10 hours, in acute pain, with clear, visible swelling in leg that had been previously injured in car accident,[13]
- a prisoner who complained of suffering second-degree burns to the face.[14]

There are far more cases that are never brought or promptly dismissed because of the physical injury requirement. Prior to enactment of the PLRA, we brought suit on behalf of women who were constantly splattered with bodily waste as a result of being housed with severely mentally ill women. Our clients could not sleep at night because the mentally ill women shrieked and carried on loud conversations, often with themselves. We would not bring that suit today. Our clients were degraded, they were deprived of sleep, but they suffered no physical injury.

Recently, we have concluded that suits could not be brought by men who complained of being chained to a bed in one case and a grate in the floor in another, each left for several days without breaks and so they had to defecate and urinate on themselves repeatedly, or by women who complained that officers barged into their shower and toilet areas without announcing themselves, opened the shower curtains and made sexual comments to them.

Denying money damages is significant for several reasons. Damages awards create incentives for prison administrators to improve policies and training and not retain officers who abuse prisoners. Beyond that, the physical injury requirement changes the framework of the debate because it provides incentives for officials to

[9] 42 U.S.C. § 1997e(e) (2008) provides that "no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

[10] *Harris v. Garner,* 216 F.3d 970 (11th Cir. 2000) (en banc).

[11] *Hancock v. Payne,* 2006 WL 21751 at *3 (S.D. Miss. 2006).

[12] *Harper v. Showers,* 174 F.3d 716, 719–20 (5th Cir. 1999).

[13] *Jarriett v. Wilson,* 162 Fed. Appx. 394, 399 (6th Cir. 2005).

[14] *Brown v. Simmons,* 2007 WL 654920 at *6 (S.D. Tex. 2007).

argue that truly reprehensible and degrading conduct was acceptable because it did not produce a "physical injury."

The "physical injury" provision of the PLRA should be repealed.

III. JUVENILES SHOULD BE EXEMPTED FROM THE PROVISIONS OF THE PRISON LITIGATION REFORM ACT.

The PLRA is applied to juveniles.[15] All of its problems are magnified when it is applied to children. Incarcerated minors account for very little prison litigation, and are even less equipped to navigate technical areas like exhaustion. At the same time, incarcerated juveniles are at-risk for abuse and may be particularly in need of court intervention.

It was revealed last year that some officials of the Texas Youth Commission had extended the sentences of youths in their custody if they refused to have sex with a supervisor.[16] A Texas Ranger who investigated abuse at the West Texas State School in Pyote told a legislative committee, that he had seen "kids with fear in their eyes—kids who knew they were trapped in an institution that would never respond to their cries for help."[17] Even worse, this Texas law enforcement officer was unable to interest local prosecutors in the case.

Another example is provided by a case from Indiana, *Minix v. Pazera.*[18] While incarcerated as a juvenile on a theft charge in various Indiana facilities, S.Z. was repeatedly beaten by other detainees—once with padlock-covered socks. He was also raped. S.Z. suffered visible injuries and symptoms, including bruising, a split lip, a seizure-like reaction, and a bloody nose, yet staff failed to take adequate measures to protect him. S.Z. was afraid to report this abuse, because some of the staff actually instigated fights among juvenile detainees, even handcuffing some of the youths so that others could beat them. S.Z.'s mother, Cathy Minix, however, reported these assaults and threats both to staff at the facility and to state judges (who relayed the complaints to the Governor). She attempted to meet with the superintendent of one of the facilities, but staff members prevented the meeting. Ultimately, S.Z. was "unexpectedly released on order from the Governor's office."

Despite all of Mrs. Minix's efforts to notify state officials of the abuse, when she and S.Z. filed suit, it was dismissed for failure to comply with the PLRA grievance requirement. The grievance policy then in effect in Indiana juvenile facilities had numerous steps, the first one requiring that grievances be filed within two business days. The Court noted that although Mrs. Minix had made "heroic efforts" to help her son, it could not replace the requirement that he personally file a grievance. Among other things, it noted, "[h]er communications didn't comply with the general time constraints built into the grievance process."

After the Minix family suit was dismissed from federal court, the Department of Justice investigated the Indiana juvenile facilities in which S.Z. had been held. It concluded that these facilities failed "to adequately protect the juveniles in its care from harm," in violation of the Constitution. The Department specifically noted that the grievance system in the Indiana juvenile facilities—the same grievance system that resulted in the dismissal of S.Z.'s suit—was "dysfunctional" and contributed to the constitutional violations in the Indiana system.[19]

These cases illustrate why it is critically important to keep courthouse doors open to civil rights actions on behalf of incarcerated children. The Prison Abuse Reform Act would accomplish this by exempting people under 18 from the provisions of the PLRA.

CONCLUSION

To put the amendments proposed in the Prison Abuse Remedies Act in perspective, I would like to point out that even if they are adopted, most of the men, women and children in prisons and jails will not be filing lawsuits because the overwhelming majority of them have no access to lawyers and are incapable of filing suits themselves.

[15] *See* Anna Rapa, *Comment: One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits,* 23 T.M. COOLEY L. REV. 263, 279 (2006).

[16] Ralph Blumenthal, *Texas, Addressing Sexual Abuse Scandal, May Free Thousands of Its Jailed Youth,* N.Y. TIMES, March 24, 2007.

[17] Staci Semrad, *Texas Ranger Tells of Prosecutor's "Lack of Interest,"* N.Y. TIMES, March 9, 2007, at A20.

[18] 2005 WL 1799538 (N.D. Ind. 2005).

[19] Letter from Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, Governor of the State of Indiana (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (quotes appear on pages 2, 3, and 7).

At one time people in Georgia's prisons had access to lawyers from federal legal services programs as well as lawyers and law students from a program operated by the law school at the University of Georgia. These programs not only helped prisoners bring meritorious suits regarding truly egregious practices and conditions, they also advised prisoners when there was no basis for bringing a suit. This is the most effective way to prevent frivolous suits. But all that is long gone. Since 1996, legal services programs which receive federal funding have been prohibited from representing prisoners. Many states stopped providing legal assistance to prisoners at some time after that.

Today, a few states like California, Massachusetts and New York, have small programs that provide legal services to a small percentage of the many prisoners who seek their help. A few national and regional programs, like the National Prison Project and our program, are able to take cases in a few states. But in some states there is not a single program or lawyer who provides legal representation to prisoners. In the part of the country where I practice, private lawyers were never very interested in responding to prisoner complaints even before the PLRA's restriction on attorney fees. Responding to prisoners' pleas for legal representation because of beatings, rapes, sexual harassment, denial of medical care or other egregious, even life threatening denial of rights is not attractive to lawyers in private practice.

For a lawyer in private practice, just seeing the potential client for an initial interview may involve a long drive to a remote part of the state where many prisons are located, submitting to a search, hearing heavy doors slam as he or she is led to a place in the prison for the interview, waiting—sometimes for hours—for the potential client to be brought up for the interview, and conducting a semi-private interview in a dingy room. The potential client may be mentally ill, mentally retarded, illiterate, or inarticulate. The lawyer will not know until he or she gets there. Investigation of the case is immensely difficult because most, if not all, of the witnesses are other prisoners or corrections officers. It is easier to get information from the Kremlin than from many departments of corrections. The lawyer may discover that no suit can be filed because the prisoner did not file a grievance or suffered no physical injury. And then there is the long drive back. This is not the way to develop a law practice that pays the bills and supports a family.

The exhaustion requirement, the physical injury requirement, the limits on the power of the federal courts and other aspects of the PLRA before you today discourage lawyers from making these trips, interviewing inmates, and bringing lawsuits on their behalf. But even if Congress were to correct every one of those barriers to obtaining remedies for constitutional violations, most lawyers are not going to make those trips. They can make better and more secure livings doing real estate closings, handling personal injury cases, or a whole range of legal work that involves less stress and produces more income.

It is too bad and it should concern us. We believe in the rule of law, protection of constitutional rights, and equal justice. But these larger issues are not before you today. Instead, the Prison Abuse Remedies Act contains a few modest amendments that would eliminate the incentive for prisons and jails to adopt complicated grievance systems to avoid being sued and would prevent meritorious claims from being barred on hyper-technical grounds or because there was no physical injury. These amendments are in the interest of justice and they should be adopted.

Mr. SCOTT. Judge Gibbons.

TESTIMONY OF JOHN J. GIBBONS, NEWARK, NJ

Mr. GIBBONS. Mr. Chairman and Members of the Committee, thank you for inviting me to speak on H.R. 4109, the "Prison Abuse Remedies Act of 2007."

Over many years as both a judge on the United States Court of Appeals——

Mr. SCOTT. Could you check your mic? Can you bring it a little closer to you?

Mr. GIBBONS. Can you hear me now? Okay.

Over many years as both a judge on the United States Court of Appeals for the Third Circuit and as an attorney, I have become familiar with the difficult challenges faced by inmates and correctional facility managers.

I became most informed on the scope and degree of these challenges, however, when I served as co-chair of the Commission on Safety and Abuse in American Prisons, created by the Vera Institute of Justice. The Commission heard from hundreds of experts, correctional facility personnel and inmates. We visited jails and prisons nationwide. We found that oversight and accountability are critical to ensuring safety in corrections facilities, and that Federal court litigation has been one of the most effective forms of that oversight and accountability.

The Commission identified several aspects of the PLRA that inhibit access to the Federal courts and thus diminished the level of productive oversight and accountability that the courts have been demanding. That is discussed in the report at page 83 and following.

The Commission recommended four changes to the PLRA that would improve access to the Federal courts: One, that Congress should eliminate the physical injury requirement; two, that Congress should eliminate the filing fee requirement and the restrictions on attorneys' fees; three, that Congress should lift the requirement that correctional agencies concede liability as a prerequisite to court-supervised settlement; and four, that changes in the exhaustion rule should be made and require meaningful grievance procedures.

Now, this is not an exhaustive list of reforms that could be made, but I am pleased to support H.R. 4109 because it adopts essentially all of the Commission's recommendations and also makes other significant amendments to the PLRA that will ensure that Federal courts can provide justice to individual inmates and compel reforms in institutions often riddled with abuse.

Let me first address the important role that the judicial branch plays in improving the conditions in jails and prisons. Compared to other institutions, I believe courts do a reasonably good job in resolving conflicts. Moreover, courts are often the only means of external and sustained oversight of prisons and jails, and courts have proven to be quite good at monitoring conditions of confinement.

It was Federal intervention, including intervention by my former court, that led to the elimination of dangerous, out-of-date correctional facilities in many States and that reduced hazardous overcrowding in other prisons. Court involvement improved treatment of prisoners, addressing unnecessary and excessive force by corrections officers. Litigation also secured improvement in the appalling and substandard medical and mental health services of prisoners. For example, my law firm represents all of New Jersey inmates diagnosed with HIV and AIDS under a consent decree entered into in 1992, before the enactment of the PLRA, which prohibited segregated housing and led to improved medical treatment. Decrees like these are advances that should be praised and preserved, not bemoaned and rolled back.

The most obvious winners from court involvement in jails and prisons may be the inmates, but the improvement of safety and reduction of abuses in prisons in America benefits everybody, including corrections staff, inmate family members and the greater public. These benefits are all the more significant given the continued rise in the incarcerated population. According to a new Pew Public

Safety Performance Project report, 1 in every 100 adults in the United States is now in jail or imprisoned.

But we cannot cling to the illusory belief that what happens in prisons stays in prisons. Inmates take what they experienced in correctional facilities and share that experience with the society at large once they are released, and staff bring home the problems they confront in prisons where they work. Thus, it behooves all of us to improve the treatment of inmates, and the one method that has been proven is through litigation resulting in judicial resolution and oversight.

Unfortunately, the passage of the PLRA produced a decline in effective judicial oversight. The PLRA unnecessarily constrains the judge's role, limiting oversight and accountability, and ignoring the judiciary's demonstrated capacity and ability to handle what are generally basic civil rights cases.

There may have been a need to reduce illegitimate claims, although there was never any demonstration of that need during any congressional hearing that I am aware of. But assuming the need for attention to illegitimate claims, the purported curative aspects of the PLRA have led to a dangerous overdose, squeezing out legitimate claims and greatly diminishing judicial oversight. Data may indicate that the prisoner lawsuits have been almost cut in half, but they do not demonstrate that frivolous claims have been properly reduced.

One would assume that if only frivolous suits were eliminated, the percentage of successful suits would increase. If we assess whether a claim is meritorious based on its success, then the PLRA must be characterized as having failed, because the proportion of successful suits has declined since it was passed, and with that decline we have also seen an erosion of judicial oversight. Between 1995 and 2000, States with little or no court-ordered regulation of the prisons increased from 12 to 28 States.

Reform of the PLRA need not open up the floodgates of unmeritorious prison litigation, as some people fear. The amendments to the PLRA in H.R. 4109 reflect thoughtful modifications that would permit and facilitate meritorious claims and thus useful and effective judicial oversight without burdening the courts.

Pre-PLRA courts knew how to get rid of frivolous claims without waste of judicial resources, and they haven't forgotten. Pre-PLRA, the chief burden on the courts was actually the fierce and unmeritorious resistance by government organizations to meritorious claims.

As Justice John Paul Stevens observed in commenting on the PLRA, Congress has a constitutional duty to respect the dignity of all persons, even those convicted of heinous crimes. The amendments to H.R. 4109 go a long way toward recognizing and fulfilling that duty. The bill takes significant steps toward rectifying the overbroad and overly harsh provisions of the PLRA that have denied inmates with meritorious claims their day in court. The bill reaffirms Congress's faith in the judiciary to resolve and improve conditions of abuses in our Nation's teeming jails and prisons.

Thanks for inviting me to speak to you today. And I look forward to answering any of your questions.

Mr. SCOTT. Thank you.

[The prepared statement of Judge Gibbons follows:]

PREPARED STATEMENT OF THE JOHN J. GIBBONS

Mr. Chairman and members of the Committee, thank you for inviting me to speak on H.R. 4109, the "Prison Abuse Remedies Act of 2007." My name is John Gibbons. Over many years as both a Judge on the U.S. Court of Appeals for the Third Circuit and as an attorney I have become familiar with the difficult challenges faced by inmates and correctional facilities. I became most informed on the scope and degree of these challenges, however, serving with former U.S. Attorney General Nicholas de B. Katzenbach as Co-Chairs of the Commission on Safety and Abuse in America's Prisons.

Created by the Vera Institute of Justice, the Commission—composed of a group of twenty distinguished pubic servants—undertook a 15-month public examination of the most pressing safety and abuse issues in correctional facilities for prisoners, staff, and the public. The Commission heard from hundreds of experts, correctional facility personnel, and inmates. We visited jails and prisons nationwide. The Commission issued a report in June 2006, including thirty recommendations; among these were four recommendations concerning reform of the Prison Litigation Reform Act (PLRA).

In its report, *Confronting Confinement,* and recommendations, the Commission stressed the importance of oversight and accountability in addressing safety and abuse in corrections facilities. We found that federal court litigation has been one of the most effective forms of that oversight and accountability. The Commission identified several aspects of the PLRA that inhibit access to the federal courts and thus diminish the level of productive oversight and accountability the courts have demanded. The Commission recommended four changes to the PLRA that would improve access to the federal courts: (1) eliminate the physical injury requirement; (2) eliminate the filing fee requirement and restrictions on attorney fees; (3) lift the requirement that correctional agencies concede liability as a prerequisite to court-supervised settlement; and (4) change the exhaustion rule and require meaningful grievance procedures. THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT, at 86–87 (June 2006). This is not, as the report stressed, an exhaustive list of reforms that can be made. Indeed, I am pleased to support H.R. 4109, which adopts essentially all of the Commission's recommendations, and also makes other significant amendments to the PLRA that will ensure that federal courts can provide justice to individual inmates and compel reform of institutions riddled with abuse.

Let me first address the important role the judicial branch plays in improving the conditions in jails and prisons. I may have a certain bias, but I tend to think judges can do a reasonably good job of resolving conflicts. Moreover, courts have often been the only means of external and sustained oversight of prisons and jails. And courts have proven to be quite good at monitoring conditions of confinement.

In discussing prison and jail conditions and prisoner abuse it is important not to lose historical perspective. Notwithstanding the problems we confront today, thirty to forty years ago prisons were in a far more deplorable state.

It was judicial intervention that led to the elimination of dangerous out-of-date correctional facilities in many states and reduced hazardous overcrowding in other prisons. *See, e.g., Guthrie v. Evans,* 93 F.R.D. 390 (S.D. Ga. 1981); *Duran v. Anaya,* 642 F. Supp. 510 (D.N.M. 1986). Court involvement improved treatment of prisoners, addressing unnecessary and excessive force by corrections officers. *See, e.g., Sheppard v. Phoenix,* 210 F. Supp. 2d 450 (S.D.N.Y. 1991); *Madrid v. Gomez,* 889 F. Supp. 1146 (N.D. Cal. 1995). Litigation also secured improvement in appalling and substandard medical and mental health services for prisoners. For example, my law firm represents all of New Jersey's inmates diagnosed with HIV and AIDS under a consent decree entered into in 1992, before the PLRA, which prohibited segregated housing and led to improved medical treatment. *Roe v. Fauver,* C.A. No. 88–1225 (AET) (D.N.J. March 3, 1992). Decrees like these are advances that should be praised and preserved, not bemoaned and rolled back.

The most obvious winners from court involvement in jails and prisons may be inmates. But as the Commission Report makes clear, the improvement of safety and reduction of abuse in prisons in America benefits everyone, including corrections staff, inmates' family members, and the greater public. *Confronting Confinement,* at 11. This fact is all the more significant given the continuing rise in the incarcerated population. According to a new report by the Pew Public Safety Performance Project, one in every one hundred adults in the United States is now in jail or in prison. THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (Feb 28, 2008), available at http://www.pewcenteronthestates.org/uploadedFiles/

One%20in%20100(3).pdf. But we cannot cling to the illusory belief that what happens in prison stays in prison. Inmates take what they experienced in correctional facilities and share that with society at large once they are released, and staff bring home the problems they confront in there. Thus it behooves us all to improve the treatment of inmates and the one proven method has been through litigation and judicial resolution and oversight.

As scholars of prison litigation have observed, court have generally not sought out radical solutions divorced from the realities confronting prison officials. On the contrary, "the litigators and the judges in these cases sought out and relied on the best and the brightest among the acknowledged leaders in American corrections," relying on their testimony as expert witnesses and their judgment as special masters and monitors. *See* Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts, and Implications,* 24 PACE L. REV. 433, at 437–38 (2004).

In the Commission's study of prisons, we found that litigation was often welcomed, even invited, by prison administrators who sought improvement in their facilities. Indeed, criminology professor and researcher Barbara Owen told the Commission that corrections officials have asked her, "why don't you call up some of your friends and have them sue me?" *Confronting Confinement,* at 85. James Gondles, the executive director of the American Correctional Association, explained that litigation has led to increases in budgets and improvement in programs in correctional facilities, preventing the need for additional lawsuits. *Ibid.*

Unfortunately, the passage of the PLRA marked a decline in effective judicial oversight. The PLRA unnecessarily constrains the judge's role, limiting oversight and accountability, and ignoring the judiciary's demonstrated capacity and ability to handle what are generally basic civil rights cases. While there may have been a need to reduce illegitimate claims, the purported curative aspects of the PLRA have led to a dangerous overdose, squeezing out legitimate claims and greatly diminishing judicial oversight. Data may indicate that prisoner lawsuits have been almost cut in half, but they do not demonstrate that frivolous claims have been properly vetted. If we assess whether a claim is meritorious based on its success then the PLRA must be characterized as having failed because the proportion of successful suits has declined since the PLRA was passed. *Ibid.* And with that we have also seen an erosion of judicial oversight. The Commission found that between 1995 and 2000, states with little or no court-ordered regulation of prisons increased more than 130 percent, from 12 to 28 states. *Ibid.*

Reform of the PLRA need not open up the floodgates of prisoner litigation as some fear. The amendments to the PLRA in H.R. 4109 reflect thoughtful modifications that would permit and facilitate meritorious claims, and thus useful and effective judicial oversight, without overburdening the courts. In addressing the PLRA last year, the Supreme Court aptly characterized the task before you: "Our legal system . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to the law. The challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock,* 127 S. Ct. 910, 915 (2007). I now turn to how H.R. 4109 meets this challenge and improves upon the efforts of the PLRA.

Section 2 of H.R. 4109 eliminates the physical injury claim requirement for seeking compensatory damages under the PLRA. Without this critical change to the law, the PLRA bars an inmate from filing a federal civil rights action "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997(e). Serious abuse, of course, need not leave indelible physical traces. Sexual assault is one of the most insidious examples that may not leave visible marks or scars, but assuredly causes harm and trauma. Other abuses also may not cause physical injuries but do rise to the level of constitutional violations and merit legal redress. These include denial of due process, horrific conditions of confinement, and denial of religious freedom and free speech rights.

Sections 7 and 8 of H.R. 4109 restore attorney fees for PLRA claims and eliminate the filing fees for indigent prisoners. The PLRA is currently replete with provisions creating disincentives and economic burdens, discouraging inmates from filing claims, and deterring lawyers from representing inmates, even in meritorious cases. It makes little sense to discourage lawyers' involvement in prisoner cases if the purported goal of the PLRA is in part to improve the quality of claims. Indeed, counsel may serve as a screening mechanism, vetting some claims raised by an inmate and often presenting them more clearly than might the inmate.

Section 6 of H.R. 4109 removes provisions in the PLRA that permit federal courts to issue consent decrees only if the correctional agencies acknowledge they had committed constitutional violations. 18 U.S.C. § 3626 (a)(i)(A), (c)(1). These provisions

have undermined the settlement of cases because they struck at the very appeal of settlement, which is avoidance of concession of liability. In my experience as both a judge and as an arbitrator it strikes me as particularly odd to close off the options of opposing parties. Keeping all alternatives on the table is the surest way to achieve resolution of the conflict to the satisfaction of both sides. With the elimination of these requirements, federal courts will be more likely able to issue consent decrees and undertake their agreed upon critical oversight function. Section 6 also returns to the courts greater flexibility in managing their cases by providing them the authority to extend time periods before parties may move for termination of prospective relief. Currently defendant parties may move to terminate relief two years after an order and then every year thereafter. This amendment will reduce premature re-litigation and economize judicial resources, trusting in the courts to oversee their cases.

Section 3 of H.R. 4109 makes some much needed modification to the exhaustion requirement. At present, and as interpreted by the Supreme Court as recently as 2006 in *Woodford v. Ngo,* 126 S. Ct. 2378 (2006), the PLRA bars a prisoner from filing a claim in federal court unless the inmate has exhausted all administrative remedies and grievance procedures provided by the correctional facility. Failure to exhaust, which includes any procedural default such as failing to meet a two day grievance deadline, results in the automatic dismissal of the case. Section 3 amends the PLRA, providing that while an inmate must first present her claim for consideration to prison officials, if a prisoner fails to so present and the federal court does not find the claim to be frivolous or malicious, then the court shall stay the action for up to 90 days and direct the prison officials to consider the claims through the relevant procedures.

The amendment goes a long way toward curing the inequities that occur when an otherwise valid claim is dismissed on the basis of technical violations, technical processes that are often unfair and unclear to prisoners.

Consider, for example, the scenario Justice Stevens discusses in his dissent in *Woodford v. Ngo.* An inmate who is raped by prison guards and suffers a serious violation of his Eighth Amendment rights may be barred by the PLRA from bringing such a claim if he fails to file a grievance within the narrow time requirements that are often fifteen days, but in nine states span only two to five days. 126 S. Ct. 2401–02.

Or consider the case of *Balorck v. Reece,* in which a prisoner was hospitalized during the five-day period he had to file a grievance for failing to treat his heart conditions. Discharged back to prison thirty days later, he was not permitted to file a grievance by the Grievance Aide, and because he then failed to ask for an extension of time to file as per prison policy, his claim was dismissed for non-exhaustion. 2007 WL 3120110 (W.D. Ky. Oct. 23, 2007).

Precluding an inmate who has suffered sexual assault from raising a legitimate claim in federal court—who may have failed to meet the parsimonious time requirements of the state's grievance system owing to a reasonable fear of retaliation or immediate trauma—does not comport with the legislative intent of the PLRA. Nor should hyper-technical adherence to unfair grievance procedures that are mischaracterized by prison staff prevent an injured inmate from filing his claim in federal court. As Senator Orrin Hatch explained in introducing the legislation, "I do not want to prevent inmates from raising legitimate claims." 141 Cong. Rec. 27042 (Sept. 29, 1995) (quoted in *Woodford,* 126 S. Ct. 2401). Added co-sponsor Senator Strom Thurmond, "[The PLRA] will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates." 141 Cong. Rec. 27044 (Sept. 29, 1995) (quoted in *Woodford,* 126 S. Ct. 2401). The amendments in H.R. 4109 help realize that laudable goal of the sponsors of the PLRA. Some critics suggests that alleviating the exhaustion requirements will reward lazy inmates who fail to file timely grievances and will result in stale claims. However, in my experience in both adjudicating and litigating prisoner complaints, I rarely encountered an inmate who was loathe to complain and file a grievance, barring fear of retaliation.

It deserves mentioning that the grievance procedures themselves must be improved. It is neither sensible nor just to require that inmates exhaust procedures that do not afford them legitimate means to remedy their complaints. The *Woodford v. Ngo* decision left unaddressed "whether a prisoner's failure to comply properly with procedural requirements that do not provide a 'meaningful opportunity for prisoners to raise meritorious grievances' would bar the later filing of a suit in federal court." 126 S. Ct. at 2403 (Stevens, J., dissenting (quoting majority opinion)). At least three justices made clear that they would likely consider such preclusion unconstitutional. *Id.* at 2403–04. (Stevens was joined in dissent by Justices Souter and Ginsburg). The PLRA should be amended to fulfill the constitutional requirement

"that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges." *Id.* at 2404 (citing *Lewis v. Casey,* 518 U.S. 343, 351 (1996)).

At a minimum, Congress should not apply the exhaustion requirement in instances where the grievance procedures do not provide a meaningful opportunity to raise meritorious grievances. Congress previously tethered exhaustion to fulfillment of federal standards for grievance procedures. The predecessor to the PLRA, the Civil Rights of Institutionalized Persons Act (CRIPA), limited application of the exhaustion rule to the existence of grievance procedures that met the standards set by the Department of Justice. 42 U.S.C. §1997e(a)(2) (1994), *amended by* Prison Litigation Reform Act of 1995 §803(d); 28 C.F.R. §§40.1–40.22. Our Commission recommended a return to this link and a return to encouraging meaningful grievance procedures.

The DOJ standards include simple but essential features such as written grievance procedures available to all employees and inmates, 28 C.F.R. §40.3; assurance of invoking grievance procedures regardless of discipline or classification to which inmates may be subject, 28 C.F.R. §40.4; applicability to a broad range of complaints, 28 C.F.R. §40.4; affording a reasonable range of remedies, 28 C.F.R. §40.6; and a simple standard form for initiating grievances. States or subdivisions of the states may apply to the Attorney General for certification of grievance procedures. 28 C.F.R. §40.11. An application for certification shall be denied in the event the Attorney General finds the procedures do not comply with these standards or are "no longer fair and effective." 28 C.F.R. §40.16. These regulations also require the Attorney General to notify the federal appellate and district courts of the certification status of the grievance procedures. 28 C.F.R. §40.21. The legislative history indicates the very purpose behind exhaustion under CRIPA was to "stimulate the development and implementation of effective administrative mechanisms for the resolution of grievances in correctional . . . facilities." H.R. Conf. Rep. No. 897, 96th Cong. 2d Sess. 9 (1980). The PLRA turned that laudable goal on its head, making exhaustion a blunt instrument barring even meritorious claims regardless of the inadequacy of the grievance procedures.

Also improperly included in the overbroad sweep of the PLRA are juvenile inmates. Happily, section 4 of H.R. 4109 seeks to rectify this morally unsound application and exempts juveniles from the PLRA. Especially vulnerable to abuse in jails and prisons, yet less mentally equipped than adults to maneuver administrative and legal processes, it is especially galling to burden juveniles with the stringent time and filing requirements of the PLRA. Moreover, I have not seen statistical evidence that juveniles have filed excessive, frivolous lawsuits.

In conclusion, I unhesitatingly express my support for H.R. 4109. The bill takes significant steps toward rectifying the overbroad and overly harsh provisions of the PLRA that have denied inmates with meritorious claims their day in court. In addition, the bill reaffirms Congress's faith in the Judiciary to resolve and improve conditions and abuses in our Nation's teeming jails and prisons.

As Justice Stevens observed in commenting on the PLRA, Congress has a "constitutional duty 'to respect the dignity of all persons,' even 'those convicted of heinous crimes.'" *Woodford v. Ngo,* 126 S. Ct. at 2404 (Stevens, J., dissenting) (quoting *Roper v. Simmons,* 543 U.S. 551, 560 (2005)). These amendments in H.R. 4109 go a long way toward recognizing and fulfilling that duty. I thank the Chairman and the members of the Committee for the opportunity to present this information to you.

Mr. SCOTT. Ms. Hart.

TESTIMONY OF SARAH V. HART, ASSISTANT DISTRICT ATTORNEY, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA

Ms. HART. Thank you very much, Mr. Chairman Scott, Ranking Member Gohmert and Members of the Subcommittee. I greatly appreciate the opportunity to testify here today.

H.R. 4109 proposes substantial amendments to the PLRA. Congress, however, passed the PLRA to address three critical problems: First, to address frivolous inmate lawsuits that were costing States millions of dollars, wasting correctional and judicial resources; second, the problem of long-standing consent decrees that governed over 39 of our State correctional systems; and third, fed-

erally ordered prison population caps that required the mass release of dangerous prisoners.

In the 1970's and 1980's, many prisons entered consent decrees, believing that they could help improve prison conditions. Consent decrees permitted parties to craft sweeping injunctions that were not limited by the traditional requirements governing Federal court injunctions. Prison managers, however, ultimately found that these consent decrees impaired their ability to manage prisons. Consent decrees provisions that seemed wise when they were entered proved to become outdated and counterproductive. New political administrations were bound to the poor policy choices of prior administrations.

Despite this, consent decrees were very, very difficult to change. Congress heard from numerous witnesses who complained about the adverse effects of long-standing injunctions and how hard they were to change. Many of these consent decrees had far-reaching operational and financial implications. Texas prisons, for example, could not exceed 95 percent of their designed capacity. This required that they keep 7,500 empty beds and construct new prisons and staff them.

These orders also had substantial public safety implications. For 9 years I served as the district attorney's counsel opposing a prison population cap that required the release of tens of thousands of pretrial detainees over a several-year period. Philadelphia's prior mayor had agreed to a consent decree to settle a class action without any trial, without any finding that there was a single constitutional violation. He agreed to reduce the prison population, to reduce the budget by agreeing to mass prisoner releases.

Following the Federal prison cap order, the number of fugitives in Philadelphia nearly tripled. Outstanding bench warrants skyrocketed from 18,000 to over 50,000. That is the equivalent of a year's worth of prosecutions in Philadelphia, a year's worth of crime victims with no justice. In one 18-month period, Philadelphia rearrested for new crimes 9,732 defendants released by the Federal court order. Their crimes included 79 murders, 959 robberies, over 2,200 drug-dealing cases, over 700 burglaries, 90 rapes, 14 kidnappings, over 1,000 assaults, and over 200 gun crimes.

This also included the murder of rookie police officer Daniel Boyle, who was shot by a prisoner repeatedly released by the Federal prison cap. Daniel Boyle's father testified repeatedly before Congress, urging that they enact the PLRA to prevent other families from facing what he had faced with the loss of his son. When the new mayor came in, Ed Rendell, the first thing he did, his first official act as mayor, was to file a motion to terminate that prison population cap, but he was unable to do that based on the law as it existed prior to the PLRA. Only after the PLRA passed was he able to stop the Philadelphia prison cap.

H.R. 4109 proposes to eliminate the limits on consent decrees that establish prison population caps or require the release of prisoners. It also would require limit consent decrees and injunctions.

Quite simply, if H.R. 4109 was the law today, the Philadelphia prison cap could be reestablished as a Federal court injunction without any trial showing a constitutional violation, and prosecu-

tors would be powerless to stop the entry of mass prisoner release orders or have any meaningful way to stop those releases.

H.R. 4109 also would permit the kinds of sweeping decrees and injunctions that the PLRA limited. These include ones that are not narrowly tailored, injunctions that trump State laws. There are a number of very essential requirements designed to limit the intrusiveness of Federal court injunctions that would be eliminated by this act.

H.R. 4109 also proposes to end the current requirement that a prisoner exhaust administrative remedies before filing a Federal lawsuit. The PLRA exhaustion requirement, however, does not stop inmates from filing State lawsuits; rather, it takes the sensible approach that prisoners should first raise the claims with State officials before they go to a Federal court.

Correctional officials rely on inmate grievances to alert them to problems arising in prisons. The current system allows corrections managers to learn of serious problems in the prison, take prompt action to stop them and remedy past problems. It also provides an opportunity for alternative dispute resolution. Under the new proposal, there would be no incentive for inmates to do this.

H.R. 4109 also would vastly increase the fees for State and local taxpayers for prisoner lawyers. Under the PLRA, prisoners' attorneys are entitled to substantial attorneys' fees already. For example, in Philadelphia, prisoners' attorneys litigating just a preliminary injunction motion received $250,000. Other States have paid out millions of dollars in fees under the PLRA. Prisoners' attorneys, however, now want State and local taxpayers to pay them at prevailing market rates. That means, in Philadelphia, up to $450 an hour. They also want to eliminate the proportionality requirement, and they also want to reinstate getting fees for related claims, even when they are unsuccessful. Under current law, however, State and local prisoners already receive attorneys' fees that are vastly better than what wounded Iraq veterans get if they get a medical malpractice claim. They are required to pay out 25 percent of their judgment.

This Committee also heard recently from Debbie Smith over the Debbie Smith DNA Act. If Debbie Smith filed a suit against her rapist, she doesn't get dime one for attorneys' fees, and she doesn't get to go to Federal court.

The bottom line here is that State and local taxpayers are already paying substantial money for attorneys' fees to litigate these claims. The PLRA has put on some sensible limitations to that, but it should not—we should not have State and local taxpayers underwrite and pay out attorneys' fees that are vastly disproportionate to what other plaintiffs get.

Thank you very much for the opportunity to speak here today.

Mr. SCOTT. Thank you.

[The prepared statement of Ms. Hart follows:]

STATEMENT
OF
SARAH V. HART

FORMER DIRECTOR OF THE NATIONAL INSTITUTE OF JUSTICE
AND COUNSEL TO
PHILADELPHIA DISTRICT ATTORNEY LYNNE ABRAHAM

PRESENTED TO
THE SUBCOMMITTEE ON CRIME,
TERRORISM, AND HOMELAND SECURITY OF
THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

AT THE HEARING ON H.R. 4109
("Prison Abuse Remedies Act of 2007")

APRIL 22, 2008

Thank you very much, Mr. Chairman Scott, Ranking Member Gohmert, and members of the Subcommittee on Crime, Terrorism, and Homeland Security. I am Sarah Hart and I currently represent (and previously represented) the Philadelphia District Attorney in prison litigation involving allegations of crowding in the Philadelphia jail system. I have also served as the Chief Counsel for the Pennsylvania Department of Corrections and as the Director of the National Institute of Justice of the United States Department of Justice. I appreciate greatly the opportunity to testify before the Subcommittee on H.R. 4109.

I. INTRODUCTION

H.R. 4109 proposes substantial amendments to the Prison Litigation Reform Act (PLRA), a bipartisan Act that passed overwhelmingly over a decade ago. H.R. 4109's amendments, if enacted, would essentially return us to the legal landscape that existed before the PLRA. Congress enacted the PLRA for good public policy reasons, and the proposed sweeping changes are not warranted. I strongly urge this Subcommittee to not support H.R. 4109.

II. WHY CONGRESS PASSED THE PLRA

Congress passed the PLRA over ten years ago for good reasons. In the 1990s, the National Association of Attorneys General (NAAG) and the National District Attorneys Association (NDAA) strongly urged Congress to address substantial problems with prison litigation. NAAG estimated that frivolous inmate lawsuits cost more than $80 million each year. Taxpayers footed the hefty bill for corrections lawyers (to defend these lawsuits), prison staff (to gather information to respond to the suits and transport the offenders to the courthouse), court clerks (to process mountains of legal filings) and judges (to rule on the claims). At that time, frivolous inmate lawsuits were swamping our Federal courts, making it more difficult for the Federal courts to address other legitimate claims.

At the same time, the attorneys general and prosecutors were especially concerned about Federal court injunctions and consent decrees that required the release of inmates or consumed substantial criminal justice resources. At the time the PLRA was passed, thirty-nine state prison systems operated under some Federal court order or injunction.[1] Some of these orders had far-reaching operational and financial implications. Texas prisons, for example, could not exceed 95% of their design capacity.[2] Given that

[1] See Overhauling the Nation's Prisons: Hearings Before the Senate Judiciary Committee, 104 Cong. (1995) (statement of John J. DiIulio, Professor of Politics and Public Affairs at Princeton).

[2] See Ruiz v. Estelle, 161 F.3d 814, 825-27 (5th Cir. 1998) (describing prison capacity limits contained in consent decrees that have the effect of requiring Texas to build more prisons); Alberti v. Klevenhagen, 46 F.3d 1347, 1352 (5th Cir. 1995) ("After years of litigation, in 1985, the State entered into a stipulation, requiring it to limit its prison population to ninety-five percent of capacity.").

Texas's prototypical prisons cost $46 million each to construct, the 95% population cap had huge financial implications.

In the 1970s and 1980s, many prison systems entered consent decrees believing that they would help improve prison conditions. These court agreements often settled difficult and potentially embarrassing lawsuits at seemingly minimal financial costs. Consent decrees also gave prison administrators leverage in the inevitable budget battles with other government agencies.[3] Consent decrees also permitted parties to craft sweeping injunctions that did not need to comply with the traditional limits on Federal court injunctions.

Prison managers ultimately found that consent decrees impaired their ability to manage prisons. Consent decree provisions that seemed wise years earlier soon became outdated and counterproductive. Despite this, consent decrees were very difficult to change. Prison managers no longer could re-evaluate and revise policies when the old ones didn't work or when new information became available. Staff was disempowered, and their ingenuity and initiative were stifled. Courts, lawyers, and court-appointed special masters often had greater control than prison managers. Congress heard from numerous witnesses who complained about the adverse effects of these longstanding injunctions.[4]

[3] For example, prison administrators could resist budget cuts because they might suffer large fines for any variety of consent decree violations. But many later learned that such agreements could be incompatible with government fiscal restraint efforts. When, for example, Philadelphia faced bankruptcy, City officials began prioritizing social work services, in the event that future layoffs became necessary. They prioritized prison social workers ahead of every other need---including the homeless, abused and neglected children, crime victims, and AIDS patients---simply because a consent decree mandated staffing levels. Later, a court fined Philadelphia $400,000 for violating that consent decree because social workers failed to respond to inmate requests within 72 hours. Mayor Edward Rendell's chief of staff publicly criticized the fine levied against the financially distressed city as being equivalent to "realigning the deck chairs" on the sinking Titanic.

[4] See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866 & H.R. 667 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (1995) at pp. 26-32 (testimony of William P. Barr, former Attorney General, United States Department of Justice); pp. 32-37 (testimony of Paul T. Cappuccio, former Associate Deputy Attorney General, United States Department of Justice); pp. 106-115 (testimony of O. Lane Cotter, Executive Director of the Department of Corrections for the State of Utah); pp. 37-45 (testimony of John J. Dilulio, Professor of Politics and Public Affairs, Princeton University); pp. 45-51(testimony of Lynne Abraham, District Attorney of Philadelphia); pp. 54-60 (testimony of Michael Gadola, Director, Office of Regulatory Reform, State of Michigan). See also pp. 51-52 (Resolution of December 3, 1994, National District Attorneys Association).

Prison administrators found it virtually impossible to end these counter-productive decrees. Often, these consent agreements were entered by prior political administrations and bound successor administrations to particular policy choices or budget expenditures. The standards for decree modification and termination granted great discretion to Federal judges to retain jurisdiction, sometimes for decades. Prison officials were required to demonstrate that the goals of the consent decree had been "achieved," not simply that no prisoner was suffering a constitutional deprivation. Many administrators became embroiled in difficult and costly litigation just to change minor provisions of consent decrees.

Some jurisdictions became embroiled in contractual minutiae. New York City, for example, had consent decrees so detailed that they even dictated the type of cleanser—Boraxo—required to be used to clean the floors. When prison gangs started using jewelry as gang identifiers, corrections officials couldn't simply enact a new policy to limit gang activity. They became bogged down in Federal litigation and negotiations about whether they could limit the type of jewelry an inmate could wear. These types of issues—from cleanser choices to inmate trinkets—were deemed worthy of protracted Federal Court litigation.

A number of jurisdictions were especially concerned about Federal court orders requiring the release of prisoners. For 9 years I served as the District Attorney's counsel opposing a prison population cap that required the release of tens of thousands of pretrial detainees over several years. Philadelphia's mayor had agreed to a consent decree to settle a class action lawsuit without a trial. He agreed to reduce the prison population by releasing "non-violent" offenders. Instead of individualized bail review, with Philadelphia judges considering a criminal defendant's dangerousness to others or his risk of flight, the Federal consent decree required a "charge-based" system of prison admissions. Suspects charged with so-called "non-violent" crimes---including stalking, car jacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terroristic threats, and gun charges---were not subject to pretrial detention.

Following the implementation of prisoner releases under the Federal court order, the number of fugitives in Philadelphia nearly tripled; outstanding bench warrants skyrocketed from 18,000 to 50,000. In one 18-month period (from January 1993 to June 1994), Philadelphia rearrested for new crimes 9,732 defendants released by the Federal court order. These crimes included 79 murders, 959 robberies, 2215 drug dealing cases, 701 burglaries, 2,748 thefts, 90 rapes, 14 kidnappings, 1,113 assaults, 264 gun crimes, and 127 drunk driving cases. When the new mayor (Edward Rendell) took office, he immediately attempted to terminate the consent decree. He was unable to do so under the law that existed prior to the PLRA.[5]

[5] See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866 & H.R. 667 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (1995) at pp. 45-51(testimony of Lynne Abraham, District Attorney of Philadelphia); see also Ross Sandler & David Schoenbrod, Democracy by

Based on these concerns, Congress passed the PLRA in 1996 with strong bipartisan support and the support of the Clinton Administration.[6] The PLRA was later amended in 1997.[7] Together, these two laws form what is known as the PLRA.

Decree 183-192 (2003); Sarah B. Vandenbraak, *Bail Humbug! Why Criminals Would Rather Be In Philadelphia*, Policy Review 73 (Summer 1995) (detailed description of the impact of the Federal court injunctions).

[6] The PLRA began as various bills in the House and Senate. In the House, the provisions regulating prospective relief in prison conditions litigation first appeared in H.R. 554, 104 Cong. (1995), which was introduced by Congressman Canady on January 18, 1995, and referred to the Subcommittee on Crime of the House Judiciary Committee. The Chairman of the Subcommittee on Crime of the House Judiciary Committee, Congressman McCollum, then included them as Title III of H.R. 667, 104 Cong. (1995) (Title III), a broader bill on various aspects of incarceration that he introduced on January 25, 1995. The House Committee on the Judiciary marked up H.R. 667 a week later and sent it to the floor with an accompanying report, House Report No. 104-21 on H.R. 667, 104 Cong., 1st Sess. (Feb. 6, 1995) (Violent Criminal Incarceration Act of 1995, Title III) (hereinafter "House Report 21"), which contains important commentary on the provisions that ultimately became Section 802 of PLRA. The House passed H.R. 667 on February 10, 1995, and sent it to the Senate.

In the Senate, S. 400, 104 Cong. (1995) introduced by Senator Hutchison on February 14, 1995, contains the same early version of the PLRA provisions on prospective relief as H.R. 554 and H.R. 667. On July 27, 1995, shortly before the August recess, the Senate held a hearing on various proposals relating to prison reform, including S. 400 and H.R. 667, chaired by Judiciary Committee Chairman Hatch and Senator Abraham. On September 26, 1995, Senator Abraham introduced S. 1275, 104 Cong. (1995), co-sponsored by Senators Hatch, Specter, Kyl, and Hutchison. The core provisions are found in Section 2, which significantly modified prior versions of the prospective relief provisions. The following day, Majority Leader Dole introduced S. 1279, 104 Cong. (1995), cosponsored by Senator Hatch, Senator Abraham, the other Senate cosponsors of S. 1275, and additional Senators, including Senator Gramm, the Chairman of the Commerce-Justice-State Appropriations Subcommittee. S. 1279, 104 Cong. (1995) was a broader bill on incarceration (more similar in scope to H.R. 667). Section 2 of S. 1279 consisted of the prospective relief provisions contained in S. 1275, with a few additional modifications. On September 29, 1995, on the Senate floor, Senator Hatch then added the text of S. 1279 as an amendment to H.R. 2076, 104 Cong. (1995) the annual Commerce-Justice State appropriations bill, which had been reported to the floor by Senator Gramm's Subcommittee. See Cong. Rec. S14,756-14,759 (daily ed. Sept. 29, 1995). The Senate passed H.R. 2076 that same day and requested a conference with the House. The conference reported an agreed-upon version of the bill that retained the PLRA provisions added by the Senate with a few changes not relevant to this case. See H.R. Conf. Rep. No. 104-378, 104th Cong., 1st Sess. (Dec 1, 1995) at pp. 166-67 (discussing purposes of the PLRA). Both Houses of Congress approved the conference version of the bill, but the President vetoed it (with no reference to the PLRA provisions).

III. THE PLRA

In passing the PLRA, Congress sought to address a variety of issues. In response to concerns from state and local governments, the PLRA fashioned new rules to discourage inmates from filing lawsuits that were frivolous or unlikely to succeed. It imposed a partial filing fee system, which required inmates to pay full filing fees (usually through an installment plan); granted Federal judges greater discretion to dismiss lawsuits early in the litigation process; and established a "three-strikes" provision that barred multiple meritless filings. The PLRA, however, carefully protected legitimate claims and preserved the full power of the Federal courts to remedy constitutional violations. Since its passage in 1996, the PLRA has substantially reduced the number of meritless inmate lawsuits.

The PLRA also addressed substantial complaints from state and local officials about intrusive Federal court lawsuits. The PLRA encourages inmates to file prison grievances promptly with prison officials before filing a lawsuit, thereby alerting corrections managers to problems that need to be addressed and allowing them to resolve disputes before they turn into Federal lawsuits.

See Veto Message, Cong. Rec. H15,166-15,167 (daily ed. Dec. 19, 1995). A later version of the Commerce-Justice-State appropriations bill, still containing the same PLRA provisions, was then included in a final omnibus appropriations bill negotiated with the White House that ultimately became law. See H.R. 104-537 (Conf. Rep. To Accompany HR 3019) 104th Cong., 2d Sess., pp. 69 et seq. (April 25, 1996); Cong. Rec. HR 1895-1898 (daily ed. March 7, 1996). House Report 104-537 provides that the controlling portions of H.R. No. 104-378 "remain controlling and are incorporated herein by reference."

[7] Following the enactment of the PLRA, Congress became aware of some problems with courts refusing to issue timely rulings on termination motions and attempts to expand the powers of judges to continue old consent decrees for long periods of time even where there were no current constitutional violations. The Senate Judiciary Committee was especially concerned about positions taken by the Department of Justice in legal filings and took the unusual step of holding a hearing to examine PLRA implementation problems and possible solutions. See Implementation of the Prison Litigation Reform Act: Hearings before the Senate and House Committees, 104 Cong. (1996). The 104th Congress adjourned *sine die* the following week, so no further legislative action was taken at that time. On the first day of the next session, Senator Hatch introduced S. 3, the Omnibus Crime Control Act of 1997. Title IX of this legislation was designed to clarify various provisions of the PLRA relating to the termination standard. Section 902(3) proposed two amendments to the automatic stay language. Congress took no action on S. 3 itself. However, Members in both houses on the Judiciary and Appropriations Committees obtained the inclusion of a modified version of the language of §902(3) of S. 3 in H.R. 2267, the FY 1998 Commerce-State-Justice Appropriations Conference Report. See Act of Nov. 26, 1997, Pub.L. No. 105-119, Title I, § 123(b), 111 Stat. 2471.

The PLRA also addressed problems with sweeping consent decrees. The PLRA makes clear that standards that apply to litigated Federal court injunctions also apply to these injunctions entered by consent. The PLRA also provides a thoughtful system for ending injunctions and consent decrees that are no longer necessary to prevent constitutional violations. Under this system, injunctions more than 2 years old may remain in effect if the parties are in agreement. However, if government officials want to limit the injunction, they can ask a court to do so, and the prisoners would need to prove why it should remain in effect. This system prevents federal injunctions against state officials from remaining in effect longer than necessary.

The PLRA also established special rules for Federal court orders that would cap prison populations and release prisoners. Because these orders are the most intrusive of all and have such substantial public safety implications, the PLRA created additional protections. Under the PLRA, these orders are a last resort remedy that can only be entered by a three-judge panel.

IV. HOW H.R. 4109 WOULD CHANGE EXISTING LAW

In the next section, I address in detail how each section of H.R. 4109 would change existing PLRA provisions. At this point, I will discuss some key provisions of H.R. 4109.

A. Consent Decree/Injunctions

First and foremost, H.R. 4109 proposes to eliminate the limits on Federal court injunctions and consent decrees. By the proposed changes to 18 U.S.C. § 3626, Federal judges would now be free to enter the very types of injunctions that crippled corrections systems for decades. These proposed amendments would allow judges to approve injunctions or consent decrees that

1. were not necessary to correct constitutional violations;
2. were not narrowly drawn;
3. extended further than necessary; adversely affected public safety or the operation of a criminal justice system; or
4. violated state or local law.

In addition, H.R. 4109 proposes to eliminate the limits on consent decrees that establish prison population caps or require the release of prisoners. Quite simply, if H.R. 4109 was the law today, the Philadelphia prison cap could be reestablished as a Federal court injunction without any trial showing any constitutional violation. And, as prosecutors, we would be powerless to stop the entry of mass prisoner release Federal injunctions that trump state court sentences or pretrial detention orders.

H.R. 4109 would also return us to the time when it was virtually impossible to end longstanding Federal injunctions that were no longer necessary to remedy Constitutional violations. Quite simply, a Federal court injunction of a state official's

action should be an extraordinary event undertaken when it is essential to preserve the constitutional rights of prisoners. The PLRA supported that important public goal while carefully preserving the power of Federal courts to stop constitutional violations. Under the proposed changes in H.R. 4109, those sensible limits needed to ensure public safety, allow corrections managers to run prisons and save taxpayer dollars would be ended.

B. Exhaustion of Administrative Grievances

H.R. 4109 also proposes to end the current requirement that a prisoner exhaust administrative grievances before filing a Federal lawsuit. The PLRA exhaustion provision does not prohibit inmates from filing state lawsuits. Rather, it takes the sensible approach that prisoners should first raise their complaints with the correctional system before resorting to the Federal courts.

The H.R. 4109 proposal—to allow inmates to file Federal lawsuits first and then stay the suit while they file grievances—is bad public policy. State and local correctional officials rely on inmate grievances to alert them to problems arising in prisons. The current system allows corrections managers to learn of serious problems in the prison, take prompt action to stop them, and remedy past problems. It also provides an opportunity for alternative dispute resolution. Under the new proposal, there is no incentive for inmates to file grievances promptly.

Congress could, however, provide clarification to the courts about how to resolve exhaustion issues. The Supreme Court in Jones v. Bock, 127 S.Ct. 910 (2007), determined that exhaustion of administrative remedies is an affirmative defense in prison conditions litigation. Often this affirmative defense raises factual issues (e.g., whether the prisoner actually filed a grievance or whether the prisoner exhausted the appeal process within the grievance system). However, the exhaustion requirement was designed to provide a gate-keeping function where prisoners could not file Federal court actions unless they first had exhausted their administrative grievances. With the Jones decision, the courts lack direction about who should resolve factual issues involving exhaustion (the judge or the jury) or at what stage they should be resolved (pretrial or at trial). Currently, exhaustion issues are not resolved at the pretrial screening.

Where inmates have not exhausted administrative remedies, or there is a material issue of fact involving exhaustion, the interests of judicial economy would be better served if Congress clearly empowered the Federal judge to resolve this issue early on in the litigation. The judge could, if necessary, permit limited discovery on the exhaustion question and serve as the factfinder on issues such as whether the prisoner filed a grievance or whether the grievance procedure was actually available to the prisoner.

C. Attorneys Fees

Under current law, prisoners' attorneys are entitled to substantial attorneys fees. For example, in Philadelphia, prisoners' attorneys received $250,000 for litigating a

preliminary injunction. Other states have paid out millions of dollars in attorneys fees under the PLRA.

Prisoner attorneys now want more through the proposed amendments in H.R. 4109. They want state and local taxpayers to pay them at prevailing market rates (which in Philadelphia can be $450 per hour), to receive fees that are vastly disproportionate to the relief obtained, and to obtain fees for litigating unsuccessful claims (simply by showing that they are "related" to successful claims).

Even under current law, attorney for prisoners are paid at rates vastly more beneficial than the rates paid to persons suing the Federal government (including Iraq veterans with legitimate claims of medical malpractice or prisoners in federal prisons). For most victims of crime, there are no attorneys fees paid when they sue the person who committed criminal acts against them. Rather, like other plaintiffs in civil actions, the system of contingent fees requires the plaintiff to pay a share of the monetary damages or settlement to their lawyer. Given the normal system of attorneys fees for other plaintiffs, it makes no sense to require state and local taxpayers to pay for such disproportionately favorable attorneys fees.

V. H.R. 4109: SECTION-BY-SECTION ANALYSIS

SEC. 1. Title

- Self-explanatory.

SEC. 2. (Physical Injury)

- **Summary**: This section would seek to eliminate two provisions relating to the "physical injury" requirement. First, subsection (b) would amend the Federal Tort Claims Act (28 U.S.C. § 1346(b)) to remove the current limits on claims for emotional or mental injuries by federal prisoners. In addition, subsection (a) would eliminate the PLRA provision that extended the Federal Tort Claims Act limitation to all prisoner lawsuits. (28 U.S.C. §1346, as it would be amended by H.R. 4109(2), is set forth in the attached appendix.)

- **Analysis**: The Federal Tort Claims Act has long had a limitation on prisoner claims for emotional or mental injuries. The proposed amendments in Section 2 would eliminate this Federal Tort Claims provision[8] and matching PLRA

[8] H.R. 4109 (2) (b) would amend the Federal Tort Claims Act, 28 U.S.C. § 1346, by striking subsection (b)(2), which contains the following:

> ~~(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or~~

provision for all prisoner lawsuits.[9] These provisions were designed to shield prison officials from insubstantial claims. Courts, for the most part, have interpreted these provisions simply to bar *de minimus* claims. Prisoner advocates have argued, however, that the provisions would bar claims for sexual assaults and religious/First Amendment claims.

Despite prisoner advocates' claims, Federal appellate courts consistently hold that forcible sexual assaults include a "physical injury" and are not barred under this section.[10] Despite this clear weight of authority, some unpublished district court opinions have found such claims to be barred by the physical injury requirement.[11]

SEC. 3 (Administrative Remedies)

- **Summary**: Section 3 would eliminate the current PLRA requirement that a prisoner exhaust available administrative remedies before filing suit in Federal court. Section 3 would instead allow prisoners to file Federal lawsuits first, then stay the action to pursue administrative remedies.

~~emotional injury suffered while in custody without a prior showing of physical injury.~~

[9] H.R. 4109 (2) (a) would strike the following from 42 U.S.C. 1997e (e):

~~(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~

[10] See, e.g., Liner v. Goord, 196 F.3d 132, 135 (2d. Cir 1999) (alleged sexual assault not barred by physical injury requirement of 1997e(e)); Styles v. McGinnis, 28 Fed. Appx. 362 (6th Cir. 2001) (claim arising out of an allegedly involuntary rectal exam was not barred by 1997e(e)); Williams v. Prudden, 67 Fed. Appx. 976 (8th Cir. 2003) (civil rights complaint based on alleged sexual assault of female prisoner by corrections officer not barred by 1997e(e)); see also, Kemner v. Hemphill, 199 F. Supp. 2d 1264 (N.D. Fla. 2002) (complaint alleging two-hour sexual assault by another prisoner not barred by 1997e(e)).

[11] Compare Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, *5-6, 2006 WL 314514 at *2 (M.D. Pa. Feb. 9, 2006) (holding that allegation that female officer grabbed the prisoner's penis and held it in her hand was *de minimus* under § 1997e(e)) with Hancock v. Payne, Civil Action No. 1:03cv671, 2006 U.S. LEXIS 1648, 2006 WL 21751 (S.D. Miss. Jan. 4, 2006) (at summary judgment stage, where prisoners failed to support complaint allegations that raised claims of consensual conduct and sexual assaults, court found that plaintiffs had failed to adequately demonstrate a genuine issue of material fact as to a physical injury).

- **Analysis**:

 - **Current law**: The current PLRA provision, found in the Civil Rights for Institutionalized Persons Act (CRIPA) at 42 U.S.C. § 1997e, requires inmates to file administrative grievances before filing a Federal lawsuit. This provision was enacted in 1996 because Congress believed that the prior CRIPA exhaustion provisions were ineffectual.

 The exhaustion requirement is strongly supported by corrections officials and government lawyers who defend prisoner lawsuits. By strengthening the grievance requirement, prison managers are more likely to be promptly alerted to problems arising in the prison, able to take immediate action to prevent similar harms to other inmates, and able to mitigate harms to the inmate who raised the issue in the grievance. This provision was also designed to promote dispute resolution without the need for a Federal lawsuit.

 With this exhaustion requirement, Congress also struck a balance between the need to encourage prompt notice to prison officials and the inmate's ability to file meritorious claims. For example, where administrative grievances are not "available" to the individual inmate, there is no exhaustion requirement. (The Federal courts have interpreted this "availability" requirement very favorably for inmates.)[12] Additionally, inmates who do not comply with exhaustion requirements are still permitted to file state court actions.

 - **Proposed Amendment**: Under the proposed amendment, an inmate would not need to exhaust grievances before filing in Federal court. Rather, the inmate could first file the complaint, and then the civil action could be stayed for up to 90 days in order to allow the prisoner to pursue administrative grievances. However, there would be no stay if the prisoner was "in danger of immediate harm."[13]

[12] See detailed analysis and cases cited in John Boston, The Legal Aid Society, Prisoners' Rights Project, *The Prison Litigation Reform Act* 108-125 (February 27, 2006), *available at* http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf (extensive analysis and case citations relating to whether remedies are "available" under the PLRA).

[13] Specifically, Section 3 would amend 42 U.S.C. § 1997e as follows:

42 U.S.C. § 1997e. Suits by prisoners

~~(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies~~

- **Concerns:** Correctional managers believe that the proposed amendment would effectively eliminate the prison management benefits of prompt inmate grievances (dispute resolution, prevention of future harms, and mitigation of harms). In other words, the proposed amendments would encourage prisoners to complain first to the Federal courts before they make any attempt to alert prison managers to the purported problems or attempt to resolve the matter promptly without litigation. Opponents of this amendment also cite to (1) opinions that hold that where grievances are not "available" to a prisoner because of the actions of correctional officials, the PLRA limit does not apply;[14] (2) grievance procedures that contain explicit provisions barring staff

~~as are available are exhausted.~~

(a) Administrative Remedies-

(1) PRESENTATION- No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

(2) STAY- If a claim included in a complaint has not been presented as required by paragraph (1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

(3) PROCEEDING- Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved.

[14] See, e.g., Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004) (threat of criminal charges made grievances unavailable); Brown v. Croak, 312 F.3d 109, 112-13 (3d. Cir. 2002) (holding that grievance system was "unavailable" to prisoner if (as alleged) security officials told the plaintiff to wait for the completion of the investigation before grieving, and then never informed him of its completion); Dole v. Chandler, 438 F.3d 804 (7th Cir. 2006) (holding that "[p]rison officials may not take unfair advantage of the exhaustion requirement" and that " remedy becomes "unavailable" if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]" is not an 'available' remedy under § 1997e(a)..."); Miller v. Tanner, 196 F.3d 1190 (11th

from retaliation; (3) the independent "retaliation" claims that arise for such retaliator conduct;[15] and (4) the prisoner's right to pursue claims in state courts even when they have not complied with the grievance requirement.

SEC. 4. (Juveniles)

- **Summary**: The amendments in Section 4 would eliminate the following for persons under the age of 18: (1) limits on injunction orders and consent decrees (including release orders); (2) *in forma pauperis* filings; (3) the requirement to exhaust administrative grievances; (4) judicial screening of complaints, (5) video-conferencing technology for hearings, and (6) attorney fee limits. Most of these issues are the subject of other proposed amendments in HR 4109. Section 4 contains separate amendments that would completely exclude persons under the age of 18.

- **Analysis**:
 - **Section 4(a)**: Section 4(a) proposes to amend definitional provisions to remove persons under the age of 18 from the PLRA limits on injunctions and consent decrees.[16] Currently, 18 U.S.C. § 3626 contains very specific

Cir. 1999) (holding that grievance decisions that stated it was non-appealable need not be appealed).

[15] Prisoners can file civil rights actions commonly known as "retaliation claims" when they are subject to retaliation for the filing of an administrative grievance. The basic law on retaliation is found in the Supreme Court's decision in Mount Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977) (discussing general elements of a retaliation claim---protected conduct by plaintiff, adverse action by defendant, and causation). The Federal courts have repeatedly held that the filing of a grievance is conduct the First Amendment protects and that retaliation against an inmate for filing a grievance is a clear basis for a separate civil rights action. See, e.g., Mitchell v. Horn, 318 F.3d 523 (3d. Cir. 2003) (allegation that false disciplinary charges were filed to retaliate for the filing of complaints against the officer states a First Amendment claim); Siggers-El v. Barlow, 412 F.3d 693 (6th Cir. 2005) (retaliation claim sustained where prisoner alleged he was punished for filing a complaint).

[16] These definitional provisions are found in 18 U.S.C. § 3626 and would be amended as follows:

> (g) Definitions. As used in this section--
> * * * * *
> (3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;
> (4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of

provisions relating to prisoner release orders (they can be entered only by a three-judge panel as a last-resort remedy following a finding of a constitutional violation for overcrowding). The amendment proposed by Section 4(a) would remove persons under the age of 18 from these provisions. Thus, there would be no statutory limits on Federal release orders for persons under the age of 18 who were convicted as adults for the crime of murder. (Additional limits on this section are proposed in Section 6 of HR 4109 and will be discussed later.)

Eliminating juveniles from the PLRA prisoner release limits is very problematic. Congress had good reasons to apply the limits on injunctions, consent decrees, and release orders to institutional lawsuits involving facilities for juvenile delinquents and juvenile convicted on adult criminal charges. Given the serious crime issues involving persons under the age of 18, Congress should act very cautiously before returning us to time when civil rights injunctions and consent decrees required the release of juvenile offenders.

In Philadelphia, for example, there was a 1978 consent decree limiting the capacity of the City's only secure juvenile detention facility. By 1990, that consent decree had been amended three times and contained provisions identical to the prisoner release orders described supra at p.4. See Santiago v. City of Philadelphia, CA No. 74-2587, 1990 U.S. Dist. LEXIS 4308 (E.D. Pa. April 4, 1990). Under this decree involving the Youth Study Center, Philadelphia was barred from holding certain juveniles in secure detention, no matter how many crimes they committed or how many times they had escaped from non-secure community placements. One juvenile, for example, was repeatedly released under this consent decree despite numerous arrests for car thefts and escapes from non-secure detention facilities. He was held in secure detention only after he stole another car, fled from police, and crashed. He killed a widower with 9 children and a young girl, and made her sister a paraplegic.[17]

reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains prisoners ~~juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law~~;

* * * * * * * * *

(h) Exclusion of Child Prisoners—This section does not apply with respect to a prisoners who has not attained the age of 18 years.

[17] See *Boy in Fatal Joyride Had 13 Prior Arrests/Walked Away from City Detention Facilities*, Philadelphia Daily News, October 26, 1988, p. 4.

- **Section 4(b):** This subsection would amend CRIPA (Civil Rights of Institutionalized Persons Act) to remove persons under the age of 18 from the provisions contained in 42 U.S.C. § 1997e. These provisions relate to the exhaustion of administrative grievances, the judicial screening provisions, the use of video-conferencing for hearings, and attorneys fees. This exclusion of persons under the age of 18 would be accomplished by amending the current definition of "prisoner" in 1997e(h)[18] and by adding a new exclusion subsection (i).[19] (These amendments, and the other proposed amendments to 42 U.S.C. § 1997e, are in the attached appendix.) Again, the proposed provisions would apply to persons under the age of 18 who have been tried and convicted for adult charges.

 Proponents of the amendments, while seeking amendments to the overall exhaustion provisions, are focusing on whether it is fair to require juveniles to exhaust complex administrative grievances. They have argued that because juveniles lack the capacity to contract, it seems unreasonable to expect them to file written documents that can limit their future legal options. The focus seems to be on sexual assault cases. Notably, many states have been expanding the legal rights for juvenile sexual assault victims through changes to statutes of limitations (criminal and civil) and have imposed additional reporting requirements for when persons in positions of trust suspect abuse.

 So far, however, proponents have not raised significant justifications for the screening and video-conferencing provisions. Their arguments concerning the attorneys fees limits have been raised as to all inmates and do not appear to have additional specific issues particular to juveniles.

 Opponents to the amendments appear more focused on the attorneys fee limits as there have been historic concerns about whether the attorneys fee provisions provide economic incentives for sweeping institutional litigation that does not focus on the narrow constitutional issues. These concerns have applied to institutional class actions involving adult and juvenile facilities.

[18] 42 U.S.C. §1997e(h) would be amended as follows:

(h) As used in this section, the term "prisoner" means any person <u>who has attained the age of 18 years</u> incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

[19] The new subsection, 42 U.S.C. §1997e(i) would read as follows:

<u>(i) Exclusion of Child Prisoners- This section does not apply with respect to a prisoner who has not attained the age of 18 years.</u>

- **Section 4(c):** This subsection would amend the prisoner *in forma pauperis* provisions in 28 U.S.C. §§ 1915 and 1915A to remove persons under the age of 18. The § 1915 provisions concern notice to the court concerning money in the prisoner's account and installment payments. The amendments to § 1915A would exclude persons under the age of 18 from dismissal of complaints that are frivolous, malicious, or fail to state a claim.[20] The amendments in this subsection would thus prevent application of any of these provisions to persons under the age of 18 even if they have been convicted as adults or have been emancipated.

SEC. 5. (*In Forma Pauperis* ("IFP") "three-strikes" provision)

- **Summary**: This section involves whether prisoners who have filed three or more meritless lawsuits must pay full filing fees before filing Federal lawsuits. The provision at issue is commonly known as the "three-strikes" provision.

- **Current Law**: Current IFP "installment" provisions allow prisoners to file Federal lawsuits without paying the filing fee up front but rather to make installment payments. This installment payment right is limited, however, by a "three-strikes" provision. This provision does not permit the installment payment system if a prisoner has previously filed three or more meritless lawsuits, unless he is in imminent danger of serious bodily injury. For prisoners who have "three-strikes" and do not meet the imminent danger requirement, they must pay the full filing fee before filing a Federal lawsuit.

- **Proposed Change**: Section 5 would change the current "three-strikes" provision in two ways. First, it would limit the three-strikes to those lawsuits the prisoner filed in the preceding 5 years. Second, it would limit the types of strikes---repeated meritless lawsuits would not count as "strikes" unless the government proved that they arose to the level of "frivolous" or "malicious" actions.[21]

[20] H.R. 4109 (4)(c) would amend the sections defining "prisoner" with the identical language. These amendments the 28 U.S.C. § 1915(h) and 1915A(c) would be as follows:

> As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

[21] Specifically, H.R. 4109 (5) would amend 28 U.S.C. § 1915(g) as follows:

> (g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions within the preceding 5 years, while incarcerated or detained in any

- **Analysis**: Caselaw is clear that prisoners do not have a constitutional right to be excused from paying filing fees prior to filing lawsuits.[22] Congress thus has great leeway in making policy choices about when IFP status should be granted to prisoners. Congress has already limited the "three-strikes" in the following ways: (1) they don't bar lawsuits, they just require prisoners to pay the full fee before they file; (2) they don't apply to state actions; and (3) they don't apply to claims where the prisoner is in imminent danger of serious bodily injury.

 Concerns: The three-strike standard rather than the time limit issue raises the greatest concerns. The proposed amendment would return to the "frivolous" or "malicious" standard which was ineffective in reducing meritless lawsuits. It remains important to discourage meritless lawsuits and to encourage prisoners to be careful about the lawsuits they file. State and local governments face significant financial costs in responding to meritless lawsuits. At the same time, inundating the Federal courts with meritless lawsuits makes it more difficult for the courts to address prisoner claims that actually have merit.

SEC. 6. (Federal Injunctions)

- **Summary**: This section would substantially amend 18 U.S.C. § 3626 and eliminate the major provisions of the Prison Litigation Reform Act (PLRA). Specifically, this section would amend the current limits on Federal court injunctions and consent decrees in prison cases. Specifically, these amendments would:
 - eliminate the provisions limiting federal court injunctions and consent decrees to the least intrusive remedies upon consideration of any adverse impact on public safety and the criminal justice system;
 - eliminate the comity provisions that limit the circumstances when state laws may be violated or state checks and balances circumvented;
 - significantly change the circumstances under which government officials can terminate consent decrees; and
 - eliminate the automatic stay provisions applicable to government-filed termination motions.

- **Subsection Analysis**:

 - **Section 6(1) (limits on injunctions and consent decrees)**: This subsection would eliminate the PLRA provisions designed to minimize adverse effects of

facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious ~~, malicious, or fails to state a claim upon which relief may be granted~~, unless the prisoner is under imminent danger of serious physical injury.

[22] See, e.g., Wilson v. Yaklich, 148 F.3d 596 (6th Cir. 1998) (rejecting numerous constitutional challenges to the PLRA *in forma pauperis* provisions for prisoners).

Federal injunctions that aren't necessary to remedy the constitutional violation. Under 18 U.S.C. § 3626(a)(1)(A), a Federal court must tailor the injunction to ensure that it extends no further than necessary to correct the constitutional violation. In making this determination, the court must specifically consider the potential impact on the criminal justice system or public safety. Under 18 U.S.C. § 3626(a)(1)(B), a Federal court cannot require state government officials to violate state law unless there is no other way to remedy the constitutional violation. The proposed amendments in H.R. 4109 § 6(1) would eliminate these sections in their entirety.[23]

State and local officials oppose these amendments because they would return us to the pre-PLRA world of incredibly complex injunctions and consent decrees that exceed the minimum of court interference necessary to fix the constitutional problem. These types of injunctions (which would be very difficult to modify or terminate given the additional amendments in Section 6(3)) previously resulted in extensive court litigation over non-constitutional issues.[24] From a policy point of view, it is difficult to justify the burdens caused by such a system on the Federal courts, state and local officials, and taxpayers. Rather, it is better to continue with the current PLRA system of requiring that extra-constitutional provisions be contained in a "private settlement agreement" enforceable through arbitration, the use of monitors, or state courts. See 18 U.S.C. §§ 3626(c)(2).

[23] § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.
(1) Prospective relief.
~~(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.~~
~~(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless~~
~~(i) Federal law requires such relief to be ordered in violation of State or local law;~~
~~(ii) the relief is necessary to correct the violation of a Federal right; and~~
~~(iii) no other relief will correct the violation of the Federal right.~~

[24] See legislative history to the PLRA and hearing testimony discussed supra.

- **Subsection 6(2) (preliminary injunctions)**: This subsection would amend the provisions relating to preliminary injunctions.[25] Although it retains the limits designed to prevent overly intrusive preliminary injunctions, it eliminates provisions that allow Federal court injunctions to trump state laws (even when those provisions are not the only way to prevent the constitutional violation requiring the preliminary injunction). In addition, it eliminates the 90-day limit on preliminary injunctions. (Current law permits the 90-day injunction to continue if made final. Additionally, courts will often extend the preliminary injunction if new evidence is available.)

 This 90-day PLRA provision was originally created because many jurisdictions had preliminary injunctions remain in effect for years without the plaintiffs seeking a final injunction hearing. Officials saw this as problematic because preliminary injunctions could be based on hearsay evidence and are usually entered before full discovery.[26]

 While proponents of these amendments have argued that the 90-day time period is too short to allow for a full trial in institutional litigation, they have failed to account for Federal court orders that have extended or granted preliminary injunctions. To my knowledge, no one has pointed to any constitutional violations that have resulted from the expiration of a preliminary injunction.

[25] H.R. 4901 §(6)(2) would amend 18 U.S.C. § 3636(2) as follows:

> (2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief ~~and shall respect the principles of comity set out in paragraph (1)(B)~~ in tailoring any preliminary relief. ~~Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.~~

[26] For example, Pennsylvania was subject to a preliminary injunction relating to tuberculosis treatment that lasted almost 4 years. See Austin v. Pennsylvania Dep't. of Corrections, 876 F. Supp 1437, 1445-46 (E.D. Pa. 1995) (describing preliminary injunction in effect from 1992). This preliminary injunction ended in 1996 after the passage of the PLRA.

- **Subsections 6(3), 6(4), 6(5), & 6(6) (termination of injunctions/consent decrees):** These subsections would amend the PLRA provisions relating to the termination of injunctions. Subsection 6(3) would change the termination standards,[27] while subsection 6(4) would allow courts entering injunctions and consent decrees to, on their own, limit the future time period when a defendant could seek to terminate the order.[28] Subsection 6(5) strikes the existing termination standard that would be replaced by the subsection 6(3) amendments.[29] Subsection 6(6) likewise would strike a reference to the provisions eliminated by subsection 6(4).[30]

[27] H.R. 4901(6)(3) would amend 18 U.S.C. § 3626(b) as follows:

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

[28] H.R. 4901(6)(4) would amend 18 U.S.C. § 3626(b)(1)(B) as follows:

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A). Nothing in this section shall prevent the court from extending any of the periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer that those time periods.

[29] H.R. 4901(6)(5) would amend 18 U.S.C. § 3626(b)(2)-(3) as follows:

~~(2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.~~

~~(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a~~

Under current law, an injunction issued to remedy a constitutional violation can be terminated after 2 years if (1) the defendant files a termination motion, and (2) the plaintiff fails to demonstrate that there are current constitutional violations that require the injunction. Defendants are also entitled to immediate termination of improperly entered injunctions based on this same standard. The proposed amendment in 6(3) would change the termination standard.

This proposed change in standard is problematic for a number of reasons. First, it places the burden on the defendant to show that no current constitutional violations exist and that they won't occur in the future. This is contrary to our Federal scheme of government. The Constitution presumes that state officials should run their prisons unless a Federal court removes this power to prevent a constitutional violation. The state's power to run its own prisons should not be removed when there are no existing constitutional violations but prison officials can't meet the impossible burden proving what will happen in the future.

The proposed amendments to the termination standard would be even more problematic in the consent decree context where (under the HR. 4109 standards) there would be no required finding of a constitutional violation. Thus, there could be litigation years after the fact about what exactly "gave rise to" the consent order and whether those circumstances arose to the level of a constitutional violation.

The amendments contained in subsection 6(4) eliminate the current termination standards that preclude a court from terminating an injunction or consent decree if the order remains necessary to correct a current and ongoing violation of a Federal right. They also eliminate the requirement that the courts tailor old injunctions to keep only those provisions that address the Federal violation.

~~current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.~~

[30] H.R. 4901(6)(6) would amend 18 U.S.C. § 3626(b)(4) as follows:

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) ~~or (2)~~, to the extent that modification or termination would otherwise be legally permissible.

- **Subsection 6(7) (consent decrees)**: The proposed amendments here would strike the PLRA provision that specifies that consent decrees must meet the injunction standards set forth in 28 U.S.C. § 3626(a).[31]

 This provision, combined with other PLRA provisions, was considered essential by PLRA supporters to limit the broad sweeping decrees that had been entered on consent and that remained in effect for decades. At the time of the PLRA's passage, there were many examples of current prison administrators burdened by long-standing, detailed consent decrees that required them to follow costly non-constitutional mandates, abide by out-date security practices, and engage in policies that were a threat to the public, inmates and staff.

 This amendment is not needed since the PLRA explicitly permits parties to enter into "private settlement agreements." These private settlement agreements can be enforced through state law or through an enforcement mechanism chosen by the parties (such as arbitration or through the use of a monitor). The only thing that private settlement agreements do not permit is for the parties to agree that a Federal court should enforce contractual provisions that exceed constitutional requirements. Given the current crowded Federal court dockets, there is no important Federal interest served by having Federal courts in the business of enforcing non-constitutional contracts.

- **Subsection 6(8) (automatic stay)**: This subsection proposes to eliminate the automatic stay provision for termination proceedings.[32] Under current law, if

[31] H.R. 4901(6)(7) would amend 28U.S.C. § 3626(c) as follows:

(c) Settlements.

~~(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).~~

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

[32] Section 6(8) would amend 28U.S.C. § 3626(E) as follows:

a judge does not timely rule on a termination motion, the injunction will be stayed after 90 days (30 days plus a 60-day extension) until the judge rules on the motion.

This PLRA provision was originally adopted in the 1997 amendments to the PLRA based on government concerns that courts were effectively denying government requests to terminate injunctions by refusing to rule on the termination motions.[33] Without prompt decisions on termination motions, state and local governments face huge operational and financial costs.[34]

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

~~(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period—~~

~~(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or~~

~~(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and~~

~~(B) ending on the date the court enters a final order ruling on the motion.~~

~~(3) Postponement of automatic stay. The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.~~

~~(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.~~

[33] For example, in Miller v. French, 530 U.S. 327 (2000) (upholding the constitutionality of the PLRA's automatic stay provision), the Federal judge had refused to take any action on the termination motion for over 3 years. See French v. Duckworth, 178 F.3d 437, 449 (1999) (lower court decision in Miller v. French) (Easterbrook, J., dissenting from the denial of rehearing en banc) (noting that once the district court declared the automatic stay unconstitutional two years ago it "has yet to take a single step" in ruling on the PLRA termination motion and the "process that is supposed to be rapid drags on with no end in sight"); see also Ruiz v. Estelle, 5th Cir. Order, Dec. 16, 1998 (directing district court to enter a final order by March 1, 1998 on PLRA termination motion filed in September 1996); Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991) (noting the district

While proponents of this amendment argue that the 90-day period is too short, courts have continued under the current PLRA provisions to exercise equitable jurisdiction when necessary after the expiration of the 90-day period.

SEC. 7. (Attorneys Fees)

Summary: This section would remove the current limitations on attorneys fees for prisoners. Specifically, this would amend CRIPA (the Civil Rights of Institutionalized Persons Act), 42 U.S.C. 1997e, by striking the attorneys fees provisions in subsection (d).[35]

court's 2 1/2 year delay in ruling on an intervention motion challenging a prison population cap).

[34] For example, federal court injunctions in Michigan required the break up of the Southern Michigan State Prison and the construction of new prisons. Even though Michigan filed a PLRA termination motion on June 10, 1996, the district court blocked implementation of the automatic stay. Although the Court of Appeals granted a discretionary stay, Michigan faced five to ten million dollars in construction delay costs while awaiting a final decision on its termination motion. See Implementation of the Prison Litigation Reform Act: Hearings before the Senate and House Committees, 104 Cong. (1996) (statement of Michigan Gov. Engler).

[35] Specifically, H.R. 4109(7) would amend 42 U.S.C. § 1997e by striking (d) as follows:

~~(d) Attorney's fees.~~

~~(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—~~

~~(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and~~

~~(B)~~

~~(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or~~

~~(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.~~

~~(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.~~

~~(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established~~

Analysis: Under current law, prisoners are entitled to limited attorneys fees. These fees cap the rate at 150% of the rate for Federal court-appointed attorneys, establish a proportionality requirement, prohibit fees for ancillary litigation, and eliminate the catalyst theory as a basis for relief. Because the Civil Rights Act does not contain these same limitations, prisoners' rights attorneys want to increase the attorneys fees available for prisoner litigation. This position is, in part, based on the belief that prisoners should be treated like other civil rights plaintiffs.

Congress should not require state and local taxpayers to pay even more money to prisoner attorneys. The current fees already provide a financial incentive for focused constitutional litigation and substantial claims. Under existing provisions of the PLRA, attorneys fees for state and local prisoners are more favorable than attorneys fees available for Federal prisoners who sue the Bureau of Prisons, wounded veterans who seek recovery for malpractice by government doctors, or rape victims who sue their rapists.[36] Currently, prisoners' rights attorneys who prove constitutional violations are entitled to substantial fees. See Bowers v. City of Philadelphia (E.D. Pa. No. 06-3229) (prisoners' rights attorney awarded $250,000 for successful preliminary injunction litigation and sought to be paid at the rate of $450 per hour).

State and local taxpayers are already paying substantial fees for prisoners' attorneys for prisoner claims filed under the Americans with Disabilities Act. These fees are not limited by the PLRA and thus there are no rate limits or proportionality requirements. These fee awards do not require that the prisoners' attorneys to demonstrate that they are being cautious in expending tax dollars. The usual mechanisms for ensuring that tax dollars are being spent cost-effectively are simply not a part of the attorneys fee process. As a result, prisoners' lawyers are often funded for more work and at a higher rate than the state or local government pays for government attorneys. They likewise have little incentive to resolve matters without litigation.

~~under section 3006A of title 18, United States Code, for payment of court-appointed counsel.~~

~~(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).~~

[36] For a detailed description of attorneys fees awarded in other types of cases and how they compare to the current PLRA attorneys fee provisions, see Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003) (en banc) (upholding the constitutionality of the PLRA attorneys fee provisions).

SEC. 8. (Filing Fees *in forma pauperis*)

- **Summary**: This section would amend the current *in forma pauperis* (IFP) provisions that apply to prisoners.[37] Specifically, subsection 8(1) would amend 28 U.S.C. § 1915(b)(1) to allow prisoners to pay no filing fees for their appeals, and subsection 8(2) would eliminate the payment of filing fees for complaints if they were dismissed at initial screening as frivolous or malicious or for failing to state a claim.

 This proposed IFP amendment would return us to the time when prisoners could file meritless suits at no cost. The current partial filing fee system led to a substantial reduction in meritless suits filed in the Federal courts. While prisoners with no money whatsoever can file lawsuits under the PLRA, the current IFP installment provisions require a prisoner with money to make some commitment of funds before bringing a Federal lawsuit. This is precisely the same choice that every free citizen must make when he or she decides to file a lawsuit.

SEC. 9. (Technical Amendment)

Summary: This is a technical amendment of the IFP provisions, 28 U.S.C. § 1915(a)(1), relating to the affidavit that must accompany an IFP petition.[38]

[37] H.R. 4901 § (8)(1) & (2) together would amend 28 U.S.C. § 1915(b)(1) as follows:

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action ~~or files an appeal~~ in forma pauperis, and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights on Institutionalized Persons Act (42 U.S.C. 1997e(c)(1)) the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

[38] (a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit ~~that includes a statement of all assets such prisoner possesses~~ (including a statement of assets such person possesses) that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

VI. CONCLUSION

I am most thankful to the Subcommittee for the opportunity to discuss these important issues. I am, of course, available to provide the Subcommittee with whatever assistance it may need as it considers H.R. 4109.

APPENDIX

1. Amendments to PLRA limits (injunctions, consent decrees, and juveniles)

18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.

(1) Prospective relief.

~~(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.~~

~~(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--~~

~~(i) Federal law requires such relief to be ordered in violation of State or local law;~~

~~(ii) the relief is necessary to correct the violation of a Federal right; and~~

~~(iii) no other relief will correct the violation of the Federal right.~~[39]

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief ~~and shall respect the principles of comity set out in paragraph (1)(B)~~ in tailoring any preliminary relief. ~~Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.~~[40]

(3) Prisoner release order.

(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to

[39] H.R. 4109(6)(1) would eliminate subsections (a)(1)(A) & (B).

[40] H.R. 4109(6)(2) would amend subsection (a)(2).

remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur--[41]

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A). Nothing in this section shall prevent the court from extending any of the periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer that those time periods.[42]

[41] H.R. 4109(6)(3).

[42] H.R. 4109(6)(4).

~~(2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.~~[43]

~~(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.~~[44]

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) ~~or (2)~~,[45] to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.

~~(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).~~[46]

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies. The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

~~(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period~~

[43] H.R. 4109(6)(5).

[44] Id.

[45] H.R. 4109(6)(6).

[46] H.R. 4109(6)(7).

~~(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or~~

~~(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and~~

~~(B) ending on the date the court enters a final order ruling on the motion.~~

~~(3) Postponement of automatic stay. The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.~~

~~(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.~~ [47]

**** [special master provisions, (f), not amended]*******

(g) Definitions. As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains prisoners ~~juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law~~;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant

[47] H.R. 4109(6)(8) (amending subsections (2)-(4)).

to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

(h) Exclusion of Child Prisoners—This section does not apply with respect to prisoners who has not attained the age of 18 years. [48]

II. Amendment to CRIPA (exhaustion, attorneys fees, physical injury, and juveniles)

42 U.S.C § 1997e. Suits by prisoners

~~(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.~~

(a) Administrative Remedies-

(1) PRESENTATION- No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

(2) STAY- If a claim included in a complaint has not been presented as required by paragraph (1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

(3) PROCEEDING- Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved. [49]

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute

[48] H.R. 4109(4)(a) (amending (g)(3) and (g)(5) and adding (h)).

[49] H.R. 4109(3) (replacing (a)).

the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) Dismissal.

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

~~(d) Attorney's fees.~~

~~(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—~~

~~(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and~~

~~(B)~~

~~(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or~~

~~(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.~~

~~(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.~~

~~(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court appointed counsel.~~

~~(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).~~[50]

~~(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~[51]

[50] H.R. 4109(7).

[51] H.R. 4109(2)(a).

(f) Hearings.

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply.

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(i) Exclusion of Child Prisoners—This section does not apply with respect to a prisoner who has not attained the age of 18 years.[52]

III. Amendments to IFP Provisions (partial filing fees, screening, and juveniles)

28 U.S.C. § 1915. Proceedings in forma pauperis

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit ~~that includes a statement of all assets such prisoner possesses~~

[52] H.R. 4109(4)(6) (amending (h) and adding (i)).

(including a statement of assets such person possesses)[53] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action ~~or files an appeal~~ in forma pauperis, and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights on Institutionalized Persons Act (42 U.S.C. 1997e(c)(1))[54] the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of

[53] H.R. 4109(9) (technical amendment to (a)(1)).

[54] H.R. 4109(8).

proceedings conducted pursuant to section 636(c) of this title [28 USCS § 636(c)]. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions within the preceding 5 years, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious ~~, malicious, or fails to state a claim upon which relief may be granted~~, unless the prisoner is under imminent danger of serious physical injury.[55]

(h) As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.[56]

[55] H.R. 4109(5).

[56] H.R. 4109(4)(c).

28 U.S.C. § 1915A. Screening

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition. As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.[57]

IV. Federal Tort Claims Act (physical injury)
§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of:
(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
(2) Any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) (1) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and

[57] H.R. 4109(4)(c).

after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

~~(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~[58]

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 [28 USCS § 6226, 6228(a), 7426, or 7428] (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179 [28 USCS §§ 3901 et seq.], the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title [3 USCS §§ 401 et seq].

[58] H.R. 4109(2)(b).

Mr. SCOTT. Mr. Preate.

TESTIMONY OF ERNEST D. PREATE, JR., JD, SCRANTON, PA

Mr. PREATE. My name is Ernie Preate. I am a lawyer up in Scranton, Pennsylvania, and, as you know, I am a former attorney.

I have heard several significant proposals here today from both the Minority and Majority for amending the PLRA, and I commend the Committee for taking up this task, and I hope that you can come to some resolution of it.

As a prosecutor for 25 years, I really never understood the true vulnerability of prisoners and the loss of hope that permeates most prisons and prisoners until I became one. And as part of my last life's work for the last 10 years, I have been graciously allowed by the Pennsylvania Department of Corrections to visit inside the walls of its prisons and to talk to both the men and the women about their fears and their hopes. Last year I visited 15 of the 26 Pennsylvania prisons, including the old and daunting big houses, Graterford, Huntingdon, Rockview, and the death row institution SCI-Greene. I spoke to almost 10,000 inmates in these question-and-answer sessions. Some of the inmates I sent there myself.

I want to make it clear that my knowledge of the prisons—and I have been doing this for 10 years—most of the guards and the staff are professionals, and they act that way, and they do their job very well. But then there are some, and I have outlined some of them, the instances in my written testimony, where there are rogue guards that engage in beatings, and that creates grievances.

Now, I am in a unique position there to understand the real-life consequences of the legislation that you pass and that my Commonwealth passes. As I say, most people do not have an intimate knowledge of what goes on inside a prison. Most people just have pictures from television, some books that they have read. But inside a prison it is different.

I can say with confidence, Mr. Chairman, that the PLRA is deeply flawed, and its unintended consequences have done serious harm to the principle that a justice system must, after all, be fundamentally just.

A serious problem with the PLRA currently as written is that it requires a prisoner to exhaust administrative remedies in order to file a Federal lawsuit. This means that he or she must file internal grievances through possibly three or four levels before the claim can be brought in Federal court. This restriction applies both in county and State prisons. The problem with that is it is very difficult to get the forms. It takes a very short period of time in which to file. And then, in fact, most of these claims are frivolous and are weeded out, however, through the provisions of the current PLRA. And I support that provision, and I think it is important that it remains in your bill, Mr. Scott. And H.R. 4109 does contain that screening provision, and I support that.

The problem with the PLRA is that it stifles the true complaints, and it is well to remember here that what we are talking about are inmates. We are not talking about lawyers. The Pennsylvania Department of Corrections, which is a very good institution, has an 18-page inmate grievance procedure that you must follow. And it says, you must do this, you must do that, you must file the pink

copy with so and so, you must file the golden copy with so and so; it must be clear, understandable, legible, et cetera, et cetera. And if you mess up, you are out. If you miss the deadlines, you are out.

The *Woodford v. NGO* case, which Jeanne Woodford was one of the petitioners in that case, that made it clear, the United States Supreme Court in 2006 made it perfectly clear, if you miss one of those deadlines by 1 day, if you don't get the paper filed in time, you are out of court. There are no exceptions. The United States Supreme Court's finding rules.

So we are talking about people here who are inmates with less than an eighth-grade education. They are to interpret an 18-page document that was drafted by lawyers. These timelines and other grievance procedure information are simply too difficult, it seems to me, to say, your rights are dependent upon, your access to the courts are dependent upon how you can manage your way through this 18-page morass.

Retaliation. That is a terrible problem inside of prisons. Intimidation is one of the problems that the PLRA requirements that inmates first exhaust their remedies with inmate grievance systems has spawned. In cases involving abuse by guards against inmates, requiring that the inmate first file the grievance exposes the inmate to future retaliation by the very person that perpetrated the harm against him. An inmate learns the quickest route to the hole is to complain about the conduct of a guard. If you think that retaliation is not an everyday part of prison life, then you don't know the reality of prisons.

I just want to say one thing. That is this, that the PLRA, as Margo Schlanger once said and has written, the exhaustion requirement is a rule requiring administrative exhaustion and punishing fate—cross every "T" and dot every "I"—by conferring constitutional immunity for civil rights violations. It is simply unsuited for the circumstances of prisons and jails where physical harm looms so large and where prisoners are so ill-equipped to comply with legalistic rules.

I made, if I may, Mr. Chairman, a couple of suggestions in my written testimony. One of them is that, in the 90-day period that you have provided for, for the prison and the prisoner to deal with these issues that are raised, that you authorize the courts to use alternative dispute resolution. It is, I think, important that that be permitted in the system to help reduce the costs and to improve the efficiencies.

Secondly, I have outlined a case here in my written testimony where a person who is a paraplegic, suing under the Americans with Disabilities Act, is forced to go through the PLRA in order to perfect his claim in Federal court. It seems to me what has happened here is that the ADA's intent is going to be frustrated. There is a case I cite in my notes, in my testimony, that says the way that you get to justify and to uphold your Federal ADA claim has to go through the PLRA and its requirements. I do not think that was the intended consequence of the PLRA.

Again, I support H.R. 4109, and I look forward to answering your questions. Thank you.

[The prepared statement of Mr. Preate follows:]

PREPARED STATEMENT OF ERNEST D. PREATE, JR.

Good Afternoon. My name is Ernie Preate, Jr. I'm an attorney licensed to practice law in the Commonwealth of Pennsylvania and the federal District Courts in Pennsylvania and the Third Circuit Court of Appeals.

I would like to thank Chairman Scott, Ranking Member Gohmert, and the rest of the Committee for inviting me to speak to you today about the "Prison Abuse Remedies Act of 2007." I rise in support of H.R. 4109.

I'd like to give you a brief background of my life experiences that brings me before you today. I am a former District Attorney in Scranton, Pennsylvania, and a former Attorney General of Pennsylvania. I'm also an attorney in private practice who defends accused criminals in state and federal courts; I also litigate Civil Rights claims on behalf of inmates and former inmates. But perhaps my most important experience for purposes of this testimony is that I was once a prisoner. I pled guilty to Mail Fraud in 1995 in connection with improperly gathering less than $20,000 in campaign contributions nearly 20 years ago. It was a violation of our state election law to take cash contributions in excess of $100. At some of my fundraisers, some people paid in cash, most paid by check. It was wrong for me to accept the cash contributions, and I am deeply sorry to the people of Pennsylvania for my actions. As punishment, I spent nearly twelve months in federal prison.

On one hand, I thus understand the importance of a strong criminal justice system. Criminal offenders need to be held accountable for their actions, but this punishment must be imposed in accordance with Constitutional standards. From my unique perspective, the proposed bill, H.R. 4109, provides the proper balance between weeding out the numerous frivolous civil lawsuits filed by prisoners and ensuring that meritorious ones receive their day in Court.

Enforcement of the law is central to our system of justice and to the protection of our communities. As a prosecutor, I focused on criminal law enforcement, but it is equally important that constitutional standards and civil laws be obeyed. The rule of law applies to everyone in this country, including prisoners and officials. Therefore, to the extent that the PLRA interferes with the rule of law and undermines the protection of constitutional rights that all Americans, including prisoners, share, it should—and must—be amended.

As a prosecutor for nearly 25 years, I never fully understood the true vulnerability of prisoners, and the loss of hope that permeates most prisons and prisoners. Then I became one. And, as part of my life's work, for the last 10 years I have been graciously allowed by the Pennsylvania Department of Corrections to visit inside the walls of its prisons and to talk to both men and women about their fears and their hopes.[1] Last year I visited 15 of the 26 Pennsylvania Prisons, including the old and daunting "big houses"—Graterford, Huntington, Rockview and the death row institution, SCI-Greene. I spoke to almost 10,000 inmates, some of them I sent there myself. Thousands have written to me, not just about their individual cases or issues, but about whether laws will be changed, such as the PLRA, and the Pennsylvania Post-Conviction Relief Act, which, along with the Anti-Terrorism Effective Death Penalty Law (ATEDP), effectively obliterates the great Writ of Habeas Corpus. They talk to me about whether ill and aged lifers have any chance of pardon or parole, and, whether those who are truly innocent can ever be freed.

I am in a unique position to understand the real life consequences of legislation that is passed, by you and my Commonwealth. I know that most individuals, including those who crafted the PLRA, have a limited knowledge about realities of prison life, and, therefore, could not have predicted the stifling consequences of this law. It was only when I was a prisoner that I understood the critical importance of the federal courts' oversight of prisons. Based upon ALL my experiences, I can say with confidence that the PLRA is deeply flawed and its unintended consequences have done serious harm to the principle that a justice system must, after all, be fundamentally just.

A serious problem with the PLRA as currently written is that it requires a prisoner to exhaust administrative remedies in order to file a lawsuit in federal court. This means that he or she must file internal grievances through possibly 3 or 4 levels before the claim can be brought in federal court. This restriction applies in both county and state prisons.

I can tell you from my own experiences, both as an inmate and as a civil rights attorney that inmates can be very intimidated in bringing grievances. I litigated one civil rights lawsuit against the Lackawanna County Prison where a few rogue

[1] The Department and I have mutually agreed that I would not discuss individual cases, grievances or prison policies during these question and answer sessions. To be clear, I proposed some of these restrictions myself.

guards, after midnight, routinely, without provocation, beat and terrorized inmates, and even other guards. There was no question about the one guard's inmate beating. The stomping boot print was clearly visible on his back. The next day, the prisoner verbally complained to the day shift officer. So did his father, a well-known businessman. The result: that night the rogue guard retaliated with a second brutal assault. With the father complaining and the assaults public and out of control, a criminal investigation and a newspaper investigation ensued. Eventually, the family hired me to pursue a lawsuit. I can't tell you the amount of my client's settlement, but I can tell you that two of the guards ultimately pled guilty and their punishment was—probation! Probation. Think of what kind of message this sends to inmates not just in Lackawanna County but to inmates everywhere.

Intimidation of inmates is one of the problems with the PLRA's requirements that the inmate first exhaust his remedies with the inmate grievance system. In cases involving abuse by guards against inmates, requiring that the inmate first file a grievance exposes the inmate to future retaliation by the very people he is vulnerable to and are harming him. An inmate learns that the quickest route to the isolation of the "hole" is to complain about the conduct of a guard. If you think that retaliation is not a part of every day prison life, then you don't know the reality of prisons.

In the above lawsuit, we learned in depositions of other assaults. In one, the inmate was handcuffed to a pole and beaten by this rogue guard, and the beating did not stop until the warden's long time secretary, hearing of the beating, ran down two flights of stairs to the guard and put a stop to it. This inmate was so intimidated and fearful, he didn't file a grievance or even a federal lawsuit.

Moreover, in the vast amount of cases, the guard will deny having done anything wrong, and the institutional review officers will simply deny, deny, deny (at each level) finding that the guard has denied and the guard is credible. Of course, this inmate may now find himself subject to retaliatory discipline with concocted violation of prison rules, such as failing to stand for a count, cursing at or threatening a guard, or constant random searches of his person and his cell.

I know of one case litigated by a colleague of mine where the inmate filed a grievance that the guards were retaliating against him for filing a prior grievance. The inmate complained that the guards were putting pebbles in his soup. What did the prison officials do in response to this grievance? The first "investigative" act was to search the inmate's own cell and "find" pills not prescribed to him.[2]

The United States Supreme Court has recently made it perfectly clear: the exhaustion requirement is non-discretionary.[3] This means that if a grievance is dismissed due to procedural defects, such as the inmate filing his appeal of the grievance one day late, his case is dismissed for failure to exhaust.

In my view, the exhaustion requirement runs afoul of basic due process requirements under the U.S. Constitution for notice. Let me give you an example. In Pennsylvania, the grievance procedures, according to the Third Circuit, encompass an initial grievance and two levels of appeal, all of which have timelines.[4] Nowhere on the state forms does it say what the timelines are for filing the initial grievance and for appealing the decision of the grievance officer to the Superintendent and the Superintendent's decision to review in Harrisburg. However, when the Superintendent is given the inmate's Appeal, at least in one of the state prisons where I have a client, it stated right on the form used for recommended action to the Superintendent: "your answer is due by (specific) date." Clearly the staff are notified of the time dates, but not inmates. This should change.

It is helpful to compare the prison grievance processes required by the PLRA to that of other legislation. In virtually every phase of administrative review, both state and federal, when decisions are made, such as Social Security denials, Workers' Compensation denials, Unemployment Compensation denials, Equal Employment Opportunity findings, it clearly states on the official finding or denial that there is a right to an appeal and the timeline for appeal of that decision. However, from what I have observed, nowhere on correctional complaint forms does it inform the inmate of his or her right to file a complaint or appeal, to whom the appeal should be directed, and, the timeline for submission of the appeal.

It is important to remember here that the education level for most inmates in Pennsylvania prisons is less than an eighth grade education. These timelines, and other grievance process information, are contained in an 18 page "policy statement"

[2] *Mincy v. Klem,* Slip Copy, 2007 WL 1576444, M.D.Pa., May 30, 2007, *Mincy v. Chemielewski,* 2006 WL 3042968, M.D.Pa., October 25, 2006. Appeal of grant of summary judgment is now before the Third Circuit.

[3] *Woodford v. NGO,* 546 U.S. 81 (2006).

[4] *Spruill v. Gillis,* 372 F.3d 218 (C.A.3 (Pa.) 2004)

ADM-804 that is given to inmates along with 26 other official policies that the inmate must be aware of. Though it is carefully crafted by lawyers, even inmates who can barely read are expected to understand their rights and responsibilities. Again, even if an inmate has a legitimate and meritorious complaint, if it is one day late, it is never going to be redressed

I would also note that Pennsylvania has no comparable PLRA, because of its sovereign immunity statutes for state and local governments.[5] Inmates therefore, have no ability to sue in Pennsylvania State Courts, the state or local governments for assaults by guards or other prisoners, for monetary compensation, as such events do not fall within the exceptions enumerated under the Pennsylvania sovereign immunity statutes. Therefore all such lawsuits are filed in the federal courts.

Another hazard of the grievance process is that the grievance process may be futile in terms of providing any relief or redress. What good would it do to complain, through the grievance process, a single beating by a guard? The grievance process will not provide him monetary recompense for his physical injuries. The Supreme Court in upholding a 3rd Circuit case held that a complaint of excessive force (beating by guard) must be grieved to final decision even though the administrative remedy cannot provide the inmate with the relief he could get in a section 1983 complaint (monetary recompense).[6]

A second problem with the PLRA I would like to address is the requirement that an inmate receive "physical injury" in order to be awarded compensatory damages. Most of the Circuits have defined physical injury as something more than de minimis. You have heard extensive previous testimony that the physical injury requirement has been used to deny redress to inmates who have been raped and sexually assaulted.[7] This requirement also appears to unfairly restrict damages which may be awarded to a disabled persons under the Americans with Disabilities Act (ADA).[8]

Let me give you an example from one of my own cases. I represent a paraplegic, a well known wheelchair racer. He was prescribed by his Board Certified Urologist to have clean rubber gloves and clean catheters to allow him to perform his elementary bodily functions. He was instructed to take all reasonable efforts during this process to not be in a place where he could transmit his germs to others , or where he could pick up the germs of others. He did this on his own for 10 years with only occasional urinary tract infections (UTI), which, is to be expected in such cases.

But when he went to state prison, for nearly a year he was never examined by the staff physician. He was placed in a cell with another inmate and he was not given a fresh supply of gloves and catheters for each bodily function elimination. He was told to wash the items himself. Therefore, it was not surprising that he began to develop repeated urinary tract infections.

The prison doctor, who had not seen the inmate for nearly a year since his arrival, without even examining the inmate, nor contacting his treating physician, told him that he was ordering a permanent catheter, called a Foley Catheter, to be inserted in the inmate's penis and that he carry a bag in which his urine would be collected.

My client, who was under 30, educated and in good physical shape, strongly objected. As one Board Certified Urologist testified, a Foley Catheter, increases rather than decreases the rate of UTI's. Further, prolonged use of a Foley Catheter causes a decrease muscle functioning of the penis and associated parts. Over time these muscles atrophy. The inmate urged the doctor to call his treating physician. The prison doctor never did call the treating physician.

As a result, the prison doctor ordered that the inmate be given a new bodily elimination regime. He could only urinate once every six hours, that each time he did so, he had to travel to the nurse's station, be examined by the nurse who would press on his stomach to see if the bladder was distended, and, only if it was, would she give him the necessary catheter and gloves. To his humiliation, she had to watch him do it himself. And if she believed he was not distended enough, she would refuse him those necessary implements. On several occasions, he was refused. The urgency to eliminate became excruciatingly painful. Several times he wet himself. His existence because so tortured that he would refuse food and drink so he could wouldn't have the urgency to eliminate.

He filed a grievance begging to be allowed to catheterize himself as needed and without humiliation. He even attached a letter from his treating physician. His complaint was denied at every level, upholding the prison doctor. Thus, we filed a fed-

[5] 42 Pa.C.S.A. § 8522, 42 Pa.C.S.A. § 8542.

[6] *Booth v. Churner,* 532 U.S. 731 (2001), *affirming Booth v. Churner,* 206 F.3d 289 (Ca.3(Pa.) 2000).

[7] *Hancock v. Payne,* 2006 WL 21751 (S.D. Miss.). *Copeland v. Nunan,* 205 F.3d 743 (CA 5(Tex) 2001)

[8] 42 U.S.C.A. § 12131 et seq.

eral lawsuit against the doctor and prison officials, alleging discrimination against him because he was disabled. He testified that he was aware of no one else in the healthy male prison population who was prescribed such a cruel and horrendous regime, alleging he was subjected to this regime only because he was disabled, a paraplegic.

In a Motion to Dismiss, the medical provider argued that he received no physical injury. While we were able to argue some physical injuries (increased bladder infections, physical pain and incontinence) it is possible that this could be lost on summary judgment.[9]

In my view, this is a clear violation of the ADA. Non-paraplegic inmates were not prohibited from urinating and forced to an every six-hour schedule. The PLRA applies to all inmate suits in federal Courts.[10] The physical injury requirement runs directly in conflict with the ADA, in that the ADA is about equal rights and emotional trauma to a disabled person and not physical injuries. In *U.S. v. Georgia,*[11] the Supreme Court held that a disabled inmate who is discriminated against could sue for compensatory damages. The requirement for physical injury potentially eviscerates the Americans with Disabilities Act as it applies to inmates, rendering its protections meaningless.

As a former Attorney General, I take seriously the litigation burden felt by the Courts and government officials. I was responsible for defending against inmate lawsuits prior to passage of the PLRA. However, any lessening of that burden must be carefully tailored to maintain accountability for violations of prisoners' Constitutional rights. The PLRA can be reformed without changing its most effective measure: the screening provision[12] that requires courts to review prisoners' cases prior to authorizing service on the defendants, and to sua sponte dismiss cases that are frivolous, malicious, fail to state a claim, or seek damages from an immune defendant. That provision represents the key mechanism to realize the PLRA's stated purpose of reducing frivolous prisoner suits. The fixes for the PLRA proposed in H.R. 4109 do not interfere with this critical provision.

I also would propose to this Subcommittee that you consider including in H.R. 4109, a provision that during the 90 day stay options in § 3(a)(2) that use of Alternative Dispute Resolution (ADR) processes be authorized as a means of early resolution of legitimate inmate grievances.. ADR consists of Mediation, Arbitration or Early Neutral Evaluation (ENE)

To briefly explain, mediation involves negotiation moderated by a trained mediator. Arbitration is an agreement to litigate the case de novo before an arbitrator whose decision is binding. ENE involves sending a case to a neutral attorney with subject matter expertise. The ENE attorney can provide a non-binding evaluation and is available to assist the parties in reaching agreement. To a *pro se* prisoner, this outsider's view may well terminate a non-meritorious claim early without running up financial costs in the system and cutting inefficient use of time by parties, attorneys and courts.

ENE was started by 20 attorneys in the Northern District of California in the 1980's and is spreading across the United States. Indeed, the Federal District Court for the Western District of Pennsylvania in Pittsburgh recently adopted ENE as an ADR tool. Unfortunately, it does not cover social security or prisoner cases. By authorizing the use of these ADR programs, I believe many districts across America will adopt ADR for prisoner cases.

These ADR programs, used in other federal cases, provide an impartial and accessible forum for just, timely and economical resolution of federal legal proceedings. Our own federal courts have recognized that the ADR processes are effective and economical use of the court's resources. In particular I believe ENE would be valuable in prisoner litigation as the neutral attorney could provide a neutral look the inmate claims to see whether the claim can be best resolved without litigation.

Lastly, as a solo practitioner, I must add my voice in support have to support the other testimony regarding the unfair provisions of the PLRA limiting attorneys fees. As a solo practitioner I have learned of many meritorious cases involving First Amendment rights, and in particular retaliation against prisoners for exercising their rights. Since these cases involve only nominal damages and not physical injury, the 150% requirement makes it impossible for someone such as me to rep-

[9] But see *Kiman v. New Hampshire Department of Corrections,* 451 F.3d 274 (1st Cir. 2006) where the First Circuit held that the lower court must determine whether the inmate must exhaust his administrative remedies as a prerequisite to suit under the ADA.

[10] 42 U.S.C.A. § 1997e sections (a) (exhaustion requirement) and (c)(1) (dismissal) both specifically state "any other Federal law" and section (e) refer to "[n]o Federal civil action".

[11] 546 U.S. 151, 126 S.Ct. 877 (2006)

[12] 42 U.S.C.A. § 1997e (c)

resent an inmate in a meritorious case. The inmates seldom have access to funds to pay an attorney up front, and if my recovery is limited to 150% of a nominal damage award, there is no way that I would be able to devote my time to such a case. I willingly do pro bono work for Pennsylvania inmates and am a registered lobbyist in Pennsylvania for criminal justice reform minded individuals and groups. But, as a solo practitioner I cannot litigate without adequate recompense for my time.

In fact, it is, in my opinion as a former Attorney General, that the 150% requirement is the single greatest contributing factor to the unwillingness of the states to settle cases, since they know they will not be required to pay the attorney's fee if only a nominal amount of a buck or two is awarded. They can afford to pay $1.50 in attorney's fees, but not the actual fee earned by the attorney based upon the time required for the lawsuit. Not only does the 150% requirement preclude attorneys from taking on meritorious cases involve clear rights violations, but it also can waste the court's resources because it eliminates the incentive for the government to settle the case prior to the attorney spending large hours on the case and thus raising their liability for the attorney's fee.

I urge you to support, and consider co-sponsoring H.R. 4109 in order to ensure that prisoners' meritorious claims can be heard in federal court. It is critical maintain the federal courts' ability to effectively oversee the corrections system and to maintain inmate belief that the system can work for them. Fixes to the PLRA are long overdue, and I commend Congressman Scott and Congressman Conyers for their leadership on this very important issue.

Mr. SCOTT. Thank you very much.

Ms. Woodford.

TESTIMONY OF JEANNE S. WOODFORD

Ms. WOODFORD. Thank you. Good afternoon. Thank you, Congressman Scott, Congressman Gohmert, and all Members of the Committee, for giving me the opportunity to testify today about H.R. 4109, the "Prison Abuse Remedies Act of 2007."

I am the former warden of San Quentin State Prison and the former director and under secretary and, for a short time, acting secretary of the California Department of Corrections and Rehabilitation. I have 30 years of experience in the field of corrections. I am here to testify in support of making necessary fixes to the Prisons Litigation Reform Act.

As a prison administrator, I was often unable to address deficiencies in our prisons, not only due to a lack of resources but, just as often, due to a lack of political will. I also was witness to the frustration of the Attorney General's Office on occasion when put in the difficult position of trying to defend a policy or a practice that was clearly in conflict with the law solely because the executive branch of State government was more comfortable following the order of a court than correcting a deficiency, itself. The political ramifications that result when a government official appears to choose prisoners and prisons over other State needs continues to prevent government leaders from adopting policies and appropriating money to address grossly deficient prison conditions.

Any good prison administrator should not fear the involvement of the courts. I have come to understand the importance of court oversight. The courts have been especially crucial during recent years as California's prison population has exploded and prison officials have been faced with the daunting task of running outdated and severely overcrowded facilities. Right now, virtually every aspect of California's prison system is under court oversight. This is true for health care, for mental health care, for dental care, for prison overcrowding and for conditions for youth. The list goes on and on.

The California Department of Corrections and Rehabilitation also has been subject to Federal court intervention to address such issues as employee investigations, employee discipline and even the code of silence that was responsible for hiding the wrongdoings of some staff in their actions against prisoners.

All of this court intervention has been necessary because of the State's unwillingness to provide the department with the resources or to make the policy changes needed to bring about necessary reform in the prison system.

The PLRA allows States to move to terminate consent decrees after 2 years. The San Quentin death row consent decree, which deals with conditions of confinement, is one example of a case where improvements were interrupted because of the provisions of the PLRA. More time was spent litigating about whether the decree was in effect than remedying the inadequate conditions on San Quentin's death row.

Death row prisoners are a perfect example of where court intervention may be absolutely necessary. Some of the most difficult conversations I had as a warden were with the family members of the victims of death row inmates. Understandably, these family members are in pain beyond belief. Some would ask me questions like, why did I even feed the prisoners? I had to explain to them that, as a prison administrator, my role was to provide for the safety and security of prisoners, staff and the public. Without court intervention, I believe I would not have been able to meet this responsibility. In California's prison system, it normally takes up to a year or more to exhaust administrative remedies through every level of appeal.

What is a prisoner to do if he or she is not receiving adequate medical treatment for a serious heart condition, for example? That prisoner may be forced to suffer for over a year waiting for a response to a grievance. I do not think that the PLRA was intended to cause this kind of harm.

There also exist countless reasons why prisoners may be unable to complete the grievance process. For instance, prisoners may be transferred from one prison to another or paroled before they are able to fulfill each level of the appeal. Grievances may be rejected because a prisoner cannot clearly articulate his or her complaint or for a minor problem, such as using handwriting that is too small. Many of these prisoners are mentally ill and are barely literate, as others have talked about.

In December of last year, the Sacramento Bee reported that the release dates for nearly 33,000 prisoners in California were miscalculated. As a result, prisoners have been forced to stay in prison beyond their appropriate sentences. According to some courts, these prisoners, however, will not be able to recover compensatory damages for this violation of their rights because over-detention does not meet the physical injury requirement.

Having served as the CDCR director and as under-secretary and as acting secretary for over 2 years, I have become familiar with the problems faced by youth incarcerated in California. This is an extremely vulnerable population that must be treated differently than the adult population. Requiring use to exhaust a complicated and a neglected grievance process is unreasonable. In some cases,

youth are only able to complete the grievance process if they have a caring adult on the outside or the attention of an attorney to assist them. Even then, sometimes they are unsuccessful.

In conclusion, good prison administrators do not need the many excessive protections imposed by the PLRA. The PLRA must be changed to ensure that courts can provide much needed oversight of correctional facilities. H.R. 4109 includes necessary fixes to the PLRA that will not open the floodgates to frivolous lawsuits but will actually help prison officials to ensure that prisons operate humanely and in accordance with the law. It is, after all, the responsibility of government to protect the rights of all citizens and, more importantly, to protect those who are the most vulnerable. We know of too many instances of prison abuse to ignore the needs of prisoners and of incarcerated youth to have appropriate access to the courts. The proposed modifications to the PLRA will allow prison administrators to respond to complaints and will ensure prison grievances about constitutional violations are not ignored.

Thank you so much.

[The prepared statement of Ms. Woodford follows:]

PREPARED STATEMENT OF JEANNE S. WOODFORD

Testimony by Jeanne Woodford for the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on H.R. 4109, the "Prison Abuse Remedies Act of 2007"

April 22, 2008

Good afternoon. Thank you to Congressman Scott, Congressman Gohmert, and all of the Committee members for giving me the opportunity to testify today about H.R. 4109, the "Prison Abuse Remedies Act of 2007." I am the former Warden of San Quentin State Prison and the former Director, Undersecretary and for a short time acting Secretary of the California Department of Corrections and Rehabilitation (CDCR). I have 30 years of experience in the field of Corrections. I am here to testify in support of making necessary fixes to the Prison Litigation Reform Act (PLRA).

I have had many years of experience responding to prison litigation. As a prison administrator, I was often prohibited from addressing deficiencies in our prisons not only due to a lack of resources, but just as often due to a lack of political will. I also was witness to the frustration of the Attorney General's office when put in the difficult position of trying to defend a policy or practice that was clearly in conflict with the law, solely because the Executive Branch of state government was more comfortable following the order of a court than correcting a deficiency itself. The political ramifications that result when a government official appears to choose prisoners and prisons over other state needs continue to prevent the Legislature and the Executive

Branch of state government from adopting policies and appropriating money to address grossly deficient prison conditions.

Any good prison administrator should not fear the involvement of the courts. From my experience over the last 30 years as a corrections official, I have come to understand the importance of court oversight. The courts have been especially crucial during recent years, as California's prison population has exploded, and prison officials have been faced with the daunting task of running outdated and severely overcrowded facilities. It would be impossible for the CDCR to accomplish its mandates without court oversight. Right now, virtually every aspect of California's prison system is under court oversight– this is true for medical care, mental healthcare, dental care, prison overcrowding, conditions for youth, due process for parolees, due process for parole lifer hearings, and the list goes on. The California Department of Corrections and Rehabilitation also has been subject to Federal Court intervention to address such issues as employee investigations, employee discipline, and the code of silence that was responsible for hiding the wrongdoings of some staff in their actions against prisoners. All of this court intervention has been necessary because of my state's unwillingness to provide the Department with the resources it requires. These lawsuits have helped the state make dramatic improvements to its deeply flawed prison system.

The PLRA allows states to move to terminate consent decrees after two years, and then prisoners have to fight their way back into court to prove ongoing constitutional violations. This process can cause major disruption to, or even halt, progress being made

through useful consent decrees. The *Thompson* Consent Decree, which deals with conditions of confinement for death row prisoners at San Quentin State Prison, is one example of a case where improvements were interrupted because of the prospective relief provision of the PLRA. More time was spent litigating about *whether* the decree was in effect than remedying the inadequate conditions on San Quentin's death row. And death row prisoners are a perfect example of where court intervention may be absolutely necessary. Some of the most difficult conversations I have had have been with the family of the victims of death row prisoners. Understandably, these family members are in pain beyond belief. Some asked me why I even fed these prisoners, and I had to explain that as a prison administrator my role was to provide for the safety and security of prisoners, staff, and the public. Without court intervention, I believe I would not have been able to meet this responsibility.

The exhaustion requirement of the PLRA, which was made even more stringent by a Supreme Court decision in a notorious case with my name on it, presents prisoners with often-insurmountable obstacles to overcome in order to file complaints in federal court. I am not making a statement about the merits of this particular case. I am simply speaking to the real world implications of the legal precedent set by the case, based upon my experience as a prison administrator. The *Woodford v. Ngo* decision established that the failure to comply with the minute-technical details of a prison grievance system will almost always lead to the dismissal of a prisoner's claim. While it is important for prison officials to be aware of problems in their facilities before claims are filed in court, it is

absurd to expect prisoners to file grievances within the prison system under *any* circumstances without *ever* making a mistake.

For those prison officials who fear the courts, the PLRA provides an incentive to make their grievance procedures more complicated than necessary. As a result, prisoners and prison officials are likely to get tied up in a game of "gotcha" rather than spending that time resolving a prisoner's complaint.

In the California prison system, it normally takes up to a year to exhaust administrative remedies through every level of appeal. But because of the serious overcrowding and understaffing problems now faced by the California prison system, it frequently takes even longer than that. What is a prisoner to do if he is not receiving adequate medical treatment for a serious heart condition? Because of the PLRA, that prisoner may be forced to suffer for over a year while he completes the exceedingly complex, and forever delayed California CDCR grievance process before he can even file a lawsuit. I do not think that the PLRA was intended to cause such harm, but it undoubtedly has, and needs to be fixed.

There also exist countless reasons why prisoners may be unable to complete the grievances process. For instance, prisoners may be transferred from one institution to another or paroled before they are able to fulfill each level of appeal. Grievances may be rejected because the prisoner could not clearly articulate his complaint, or for a minor problem such as using handwriting that is too small. Many of these prisoners are

mentally ill or barely literate. I also know of a least one state that will screen out appeals if they are not signed in blue ink and yet another state that charges prisoners to file an appeal.

The physical injury requirement of the PLRA is unnecessary and harmful. Prisoners should not have to prove a physical injury in order to obtain compensatory damages if their constitutional rights have been violated. As a prison administrator, I do not want my budget spent on damages due to lawsuits because my staff fails to do their job. Therefore, it is my responsibility to ensure that they are trained appropriately and that they come to work everyday committed to helping me run a safe and constitutional facility. In situations where something goes wrong and a violation is committed, it should not matter whether the injury was physical in nature. My facility and the state need to be held accountable regardless.

In December of last year, the *Sacramento Bee* reported that the release dates for nearly 33,000 prisoners in California were miscalculated. Because sentencing laws were misinterpreted in thousands of cases, it is taking months to review all of them and prisoners have been forced to stay in prison beyond their appropriate sentences. Today there are still hundreds of prisoners unjustly incarcerated due to judicial errors. I have been told that according to some courts these prisoners, however, will not be able to recover compensatory damages for this violation of their rights because over-detention does not meet the physical injury requirement of the PLRA.

The physical injury requirement also makes it extremely difficult for prisoners to find attorneys to represent them if they suffer a constitutional violation that is not physical in nature. Under the physical injury requirement, a prisoner who is forced to stand naked in his cell for an entire day without access to food or water is only eligible for nominal damages. As a result, he is unlikely to find an attorney who can dedicate countless hours to proving his case only to receive as little as $1.50 in compensation.

Having served as the CDCR Director, Undersecretary and acting Secretary for over two years, I have become familiar with the problems faced by youth incarcerated in California. This is an extremely vulnerable population that must be treated differently than the adult population. Requiring youth to exhaust a complicated and neglected grievance process is unreasonable. In some cases, youth are only able to complete the grievance process if they have a caring adult on the outside or the attention of an attorney to assist them. Even then, sometimes they are unsuccessful.

Youth, who rarely complain to prison officials at all, should not be included in the PLRA. They have a much more difficult time navigating convoluted grievance systems than adults. We need to ensure problems in juvenile facilities are brought to light without barriers imposed by needless laws intended to curb prisoners' access to the courts.

In conclusion, good prison administrators do not need the many excessive protections imposed by the PLRA. On the other hand, the obstacles erected by the PLRA frequently prevent necessary court oversight that would serve well both competent and incompetent

prison administrators. The PLRA must be changed to ensure that courts can provide much-needed oversight of correctional facilities, and that prisoners' legitimate claims can reach the courts so that prison and state officials may be held accountable for constitutional violations. H.R. 4109 includes necessary fixes to the PLRA that will not open the floodgates to frivolous lawsuits, but will actually help prison officials to ensure their prisons operate humanely and in accordance with the law. It is, after all, the responsibility of government to protect the rights of all citizens and more importantly to protect those who are the most vulnerable. We know of too many instances of prison abuse to ignore the need for prisoners and incarcerated youth to have appropriate access to the courts. The proposed modification to the PLRA will allow prison administrators to respond to complaints, and will ensure prisoners' grievances about meritorious constitutional violations are not ignored. In addition, the recommended changes to the PLRA will give us all the comfort of knowing that we have a system that will protect the incarcerated youth in our country.

Thank you for allowing me to testify today.

Mr. SCOTT. Thank you very much.

I want to thank all of our witnesses for your testimony. We will now have questions from the panel, 5 minutes each. I will recognize myself for 5 minutes.

Ms. Hart, the way our system works is that you have got a lot of people working independently. The legislature passes mandatory minimums. The police arrest. The judge sentences. They are all kind of independent on their own.

Is it possible to end up with a prison that is unconstitutionally overcrowded and that is lacking health care and sanitation?

Ms. HART. Absolutely.

Mr. SCOTT. Then what happens?

Ms. HART. Under the PLRA? They can sue. They can get——

Mr. SCOTT. Who can sue?

Ms. HART. The prisoners can. I will tell you that this is exactly one of the things we faced in Philadelphia. The preliminary injunction order I talked about was something where the prior prison commissioner decided to control the prison by backing up inmates into the police districts. That judge was able to enter a preliminary injunction. It was a sweeping preliminary injunction.

Mr. SCOTT. Under the PLRA?

Ms. HART. Under the PLRA.

They were awarded attorneys' fees for it, well over $250,000 ultimately, and the practice stopped.

The PLRA has carefully retained the power of Federal judges to act swiftly. In that case, for example, the judge ruled that the inmates did not have grievances available to them and did not prohibit them from filing suit.

Mr. SCOTT. How would H.R. 4109 change any of that?

Ms. HART. How would H.R. 4109 change—4109—well, in terms of stopping it? It would not. It would not stop a judge from doing it. A judge would be able to do it.

Now, you could have, for example, consent decrees that could have—the prison, for example. What has happened traditionally when prison officials sometimes feel they have too many people in their prisons is they start agreeing to consent decrees to ship them elsewhere.

There was one, for example, in Texas recently where you try and control your budget, basically, by saying we're not going to accept a certain number of prisoners, and you send them off.

Mr. SCOTT. Well, how would H.R. 4109 make things any worse than they are now?

Ms. HART. Because basically it would allow you to start doing that again. It allows certain correctional administrators to trump State laws and to make agreements that they are not permitted to and put the burden on elsewhere. It returns you back to the pre-PLRA time where people could make agreements that trumped State laws, that weren't necessary to violate constitutional violations——

Mr. SCOTT. You're trying the case—I mean, if you have a legitimate case where, in fact, you have unconstitutional conditions, how would H.R. 4109 make things any worse than they are now on a legitimate case?

Ms. HART. The biggest problem here with H.R. 4109 is the fact that it covers far beyond legitimate cases. The PLRA tried to make sure that you protected the powers of Federal judges to still remedy constitutional violations quickly. What——

Mr. SCOTT. Do you need a physical injury under the PLRA?

Ms. HART. Excuse me?

Mr. SCOTT. Do you need a physical injury?

Ms. HART. For a physical injury for emotional damages, that is what it does require. It is an extension of what was the Federal Tort Claims Act Provision. It has not stopped the type of suit——

Mr. SCOTT. If you do not have a physical injury, how do you get a constitutional violation?

Ms. HART. The courts have interpreted it very narrowly. The PLRA has not stopped lawsuits. There are a lot that still get filed. There are still substantial——

Mr. SCOTT. For unconstitutional violations without a physical injury, can those cases be brought under the PLRA?

Ms. HART. They are. The courts are interpreting it very narrowly. They are basically saying it is a de minimis injury. Candidly, I will tell you, I think that the PLRA does—try to, by lifting what was out of the Federal Tort Claims Act Provision, something designed to try and stop what were very insubstantial claims. Do I think they could have done better?

Mr. SCOTT. Let me ask Mr. Bright.

Can you bring cases like that under the PLRA?

Mr. BRIGHT. Well, the question, Mr. Chairman, is the damages suit, I think your point is very well taken.

I mentioned in my statement a woman who woke up in the night, and there was blood gushing from her neck because a mentally ill inmate had cut her throat from her ear all the way down to her chin. It almost killed her. It was just lucky that it did not.

Now, the reason for that was the Alabama Department of Corrections only had one guard supervising a room full of bunkbeds with 350 inmates in it. Now, the Commissioner of Corrections would tell you he needs more guards. The warden of the prison would tell you she needs more guards. But the fact of the matter is there was not the money there to do that. So the jail is unconstitutional. As a result of it, this woman is injured. She has got no damages suit because she does not meet the grievance procedure of—she meets, obviously, actual injury, but she does not meet the grievance procedure.

Mr. SCOTT. Well, you mentioned the Abu Ghraib Prison conditions would not be—that you would not be able to sue for those kinds of conditions. Ms. Hart suggested that, if you have unconstitutional conditions, of course they can hear those cases.

Mr. BRIGHT. Well, the point that, I think, we would have a disagreement about there is the extent of the relief that the courts can order. I mean, this bill has, basically, provisions none of us have really talked very much that very much limited what a Federal court can do in terms of the remedy that it orders and how long it can supervise what happens.

In the case that I mentioned earlier, we are in the third year now, still trying to get compliance with an order entered 2 years ago by a Federal court. Under the PLRA, as was pointed out ear-

lier, you can spend more time now litigating whether there is compliance or not, whether the decree should come to an end, and whether or not we are complying with the provisions that are there. Again, that is injunctive relief that the court ordered.

But, again, at times when I deal with the commissioner of corrections, prison lawyers, jail lawyers, who say, we'll agree, there is no question that we need to do A, B, C, and D to cure this. You cannot settle a case under the Prison Litigation Reform Act. You have got to have a finding by a judge that there is a constitutional violation, and then you are limited to 2 years in terms of how long the court can enforce that, which makes for an interesting thing; most people who disobey court orders and who are held in contempt of court pay a serious price for that. It is amazing to me that prison officials can do that with virtual impunity when that happens. I think that is part of why the act and why some of the amendments which would restore the power of the Federal courts to deal with these cases like any other cases are critically important.

Mr. SCOTT. Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

Judge Gibbons, you mentioned that your law firm represents all inmates diagnosed with AIDS in New Jersey; is that correct?

Mr. GIBBONS. Yes.

Mr. GOHMERT. Is that pro bono?

Mr. GIBBONS. Yes.

Mr. GOHMERT. It is pro bono. You are certainly to be commended—your firm is—for the work that you do there.

I guess, if this were passed, that we are talking about today, then this would allow your firm to receive attorneys' fees for that representation; is that correct?

Mr. GIBBONS. I think the significance of the HIV case is that the decree is ongoing because the problem of AIDS and HIV in the prison has not gone away.

Mr. GOHMERT. That is correct.

Does that mean you would be able to get attorneys' fees under this bill?

Mr. GIBBONS. We have regular, ongoing relationships with the authorities in the prison over conditions.

Mr. GOHMERT. Right. So, Judge, that would mean your law firm would be able to receive attorneys' fees under this bill; is that correct?

Mr. GIBBONS. Possibly, but——

Mr. GOHMERT. I understand. I am not kidding. I think it is absolutely wonderful that you are doing this, that your firm handles these cases pro bono. That is one of the reasons why I think there is agreement on both sides when it comes to sexual assault, there should not be a need for a demonstrated physical injury in order to pursue a claim. Obviously, the case that was mentioned earlier where an individual went to the hospital would have been unaffected because he did go to the hospital. There was demonstrated physical injury. Ms. Woodford mentioned that good prison administrators do not need the provisions of the PLRA.

Mr. Chairman, we invited Martin Horn, the Commissioner of the Department of Corrections and Probation of New York City to testify at the hearing. Unfortunately, Commissioner Horn was unable

to join us due to conflicts, but he has 35 years of experience in corrections, 13 years of experience as the chief executive of large correctional agencies. Although he didn't—was unable to testify today, he took the time to write a significant letter that looks more like a brief to the Committee. I would ask unanimous consent to include this in the record even though, according to Ms. Woodford, he would apparently be an administrator who is not good because he indicates he needs the PLRA.

I would ask unanimous consent to include it in the record. Okay. Thank you.

[The information referred to follows:]

The City of New York

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April 10, 2008

Honorable John Conyers, Chairman
Committee on the Judiciary
House of Representatives
2426 Rayburn Building
Washington, DC 20515

Honorable Lamar Smith, Ranking Member
Committee on the Judiciary
House of Representatives
2409 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Conyers and Congressman Smith:

I write in opposition to H.R. 4109 Proposed Amendments to the Prison Litigation Reform Act (PLRA).

I write as Chairman of the Policy Committee of the Association of State Correctional Administrators and as a corrections professional with over 35 years experience in Corrections, the last 13 years as the Chief Executive Officer of large correctional agencies.

Few laws passed by Congress have so well served their intended purpose as the Prison Litigation Reform Act, Pub. L. No. 104-134, passed in 1996. The PLRA was passed on a bipartisan basis to address legitimate concerns about excessive frivolous prisoner litigation. Prior to enactment of the PLRA, the National Association of Attorneys General estimated the cost of frivolous prisoner lawsuits at more than $ 80 million a year. Additionally, in some jurisdictions, courts were ordering the release of inmates and thereby putting the public at risk. The provisions of the PLRA were carefully crafted to balance the rights of prisoners to seek judicial redress for constitutional violations arising from the conditions of their confinement, and society's legitimate concern for management of its prisons and jails by people trained and equipped to administer them in a fashion consistent with the public's safety.

Prior to the enactment of the PLRA, prisoners filed a disproportionate share of the civil lawsuits filed in federal courts. In 1994, about 25% of the federal civil filings were on behalf of prisoners. With only 1.5 million prisoners at that time, they accounted for more than a third of the filings by the other 300 million Americans and the filings of all businesses and organizations, combined!! Most of these cases were dismissed as without merit.

The effect on the already overburdened Federal Judiciary had to be mind numbing and deleterious to the interests of the inmates who had claims with merit. As Justice Robert Jackson observed in 1953,"It must

prejudice the occasional meritorious application to be buried in a flood of worthless ones."[1] In testimony on November 8, 2007 before this committee one supporter complained, "No longer need prison or jail officials investigate or answer complaints that are frivolous..." To my mind it is better that prison and jail officials spend their limited time managing correctional institutions that further public safety, promote rehabilitation and are efficient in their use of taxpayers dollars. Furthermore, the fact is that any correctional system with a functioning inmate grievance program will responsibly investigate, respond to, and generally resolve frivolous inmate complaints along with the legitimate complaints – but internally, not by clogging up the federal court dockets

The PLRA had the desired effect. The number of filings decreased from 41,679 in 1994 to 25,504 in 2000, after enactment. Despite the thoughtful limitations PLRA imposes, a disproportionate number of filings before the Federal Courts continue to be prisoner litigation. Indeed, " From 2000 to 2005, such cases represented between 8.3% and 9.8% of the new filings in the federal district courts. or an average of about one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country."[2] Thus, it is misleading to suggest as the sponsor do that the PLRA has had a chilling effect on the ability of prisoners to obtain judicial redress. The evidence is very much to the contrary.

The sponsors and supporters of H.R. 4109 propose to amend the PLRA to rescind the requirement that claims for mental or emotional injury must also show physical injury; rescind the requirement that prisoners exhaust administrative remedies before filing a federal lawsuit; eliminate the requirement that prisoners who have been shown to have previously filed three meritless lawsuits pay full filing fees; eliminate the PLRA limitations on court orders which require them to be the least intrusive remedies and to consider their adverse impact on public safety (the so-called "needs-narrowness" test); make it more difficult for state and local officials to terminate consent decrees; and remove the limitations on attorney's fees. They argue that PLRA has prevented inmates from raising legitimate claims and that these amendments are necessary to ameliorate that effect.[3] More than 25,000 filings in a year is hardly evidence of an inability to pursue claims.

The PLRA provisions requiring physical injury mirror the requirements of the Federal Tort Claims Act (28 U.S.C. 1346) that have long contained such a limitation. Advocates point to allegations of sexual assault that result in mental or emotional injury. However, numerous circuits have consistently held that forcible sexual assaults include physical injury, by definition, and thus claims for mental or emotional injury resulting from sexual assaults are not barred.[4] Accordingly, no amendment is needed to the PLRA to render such cases justiciable.

The limitations imposed by PLRA simply put the prisoner on a comparable footing with other citizens and impose the same deterrent to litigation that other Americans face. The physical injury requirement, for

[1] *Brown v. Allen*, 344 U.S. 443,532 (1953)(Jackson, J., concurring).
[2] *Woodford v. Ngo*, 126 S. Ct. 2378, 2388 n.4.2400 (2006) (Stevens, J., dissenting).
[3] Testimony of Margo Schlanger, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, Washington, D.C. November 8, 2007, at 3.

[4] *Liner v. Goord*, 196 F. 3d 132,135 (2d Cir. 1999)(alleged sexual assault not barred by physical injury requirement of PLRA); *Styles v. Mcginnis* 28 Fed. App. 362 (6th Cir. 2001) (claim arising out of involuntary rectal exam was not barred by PLRA); *Williams v. Prudden*, 67 Fed.App. 976 (8th Cir. 2003) (civil rights complaint alleging sexual assault on female prisoner by corrections officer not barred by PLRA).

example, is "...normally required under well-settled principles of common law as well as for civil rights claims brought outside the context of prisoner suits."[5]

The PLRA provides inmates' rights to file lawsuits beyond that provided the ordinary citizen seeking redress in the federal courts. Inmates granted *in forma pauperis* status may file lawsuits for no fee. But more, to avoid creating an impediment to access to the Courts, the PLRA allows prisoners to pay their filing fees over time, **an allowance not available to you and me.** It is simply misleading to say that the so-called "frequent filers" provision of PLRA prevents access to the Courts, it doesn't. What PLRA does is establish that inmates who have demonstrably filed frivolous claims three times are required to pay the full filing fee, unless in imminent danger of serious bodily injury. It is reasonable to deny them the extraordinary benefit otherwise conferred only upon prisoners to pay in installments. Moreover, under existing court rules, any citizen may be prohibited from filing if the court concludes that a litigant has filed a large number of meritless claims; there is no reason to exclude prisoners from this rule. No amendment of this rule is necessary.

H.R. 4109 would eliminate the requirement that a prisoner exhaust administrative remedies, when available, before filing a federal lawsuit. By including this exhaustion requirement Congress struck an appropriate balance between the need to encourage prisoners to promptly notice prison and jail officials and the inmate's need to file meritorious claims. The "availability" requirement contained in PLRA as it now stands allow the inmate to file claims for state actions that are not grievable; for example, if claims of staff assault or classification determinations are not grievable in a particular correctional system, the requirement imposes no bar to immediately filing a lawsuit about such matters. As even prisoners' advocates have acknowledged, the courts already interpret this "availability requirement very favorably towards inmate claims."[6] Moreover, the supposed justification for this amendment is that inmates are reluctant to file grievances out of fear of retaliation. This is simply wrong. If an inmate cannot file, then the grievance mechanism is not deemed "available," and the exhaustion requirement does not apply.[7] Additionally the Courts have held against prison officials who retaliate against inmates for asserting their rights.[8]

Furthermore, requiring exhaustion of administrative remedies allows a correctional system's inmate grievance program to work as intended. Filing a grievance is not a meaningless administrative requirement; it is often the path to swift and appropriate resolution of a problem faced by a particular prisoner. When the grievance system is able to address a grievant's concern, it provides a far more prompt remedy than any known lawsuit wending its way through the court system. This internal resolution is appropriately favored by the PLRA as enacted, and Congress should continue to encourage administrative resolutions by retaining that provision.

As an administrator, it has been my experience that once notified of a problem, the administrator can swiftly act upon it, correct it and ameliorate the problematic condition far sooner than is the case once the matter is entangled in the highly stylized jousting between attorneys in litigation. The best remedy is to quickly identify the problem and allow the responsible administrator to correct it. According to

[5] Testimony of Ryan W. Bounds, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, Washington, D.C. November 8, 2007, at 3.
[6] John Boston, *The Prison Litigation Reform Act* (February 27, 2006) pp. 108-125, http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf.
[7] *Hemphill v. New York*, 380 F. 3d 680 (2d Cir. 2004), *Brown v. Croak*, 312 F.3d 109,112-113 (3d Cir. 2002), *Miller v. Norris*, 247 F. 3d 736, 740 (7th Cir. 2001), *Dole v. Chandler*, 438 F.3d 804 (7th Cir. 2006)
[8] *Mitchell v. Horn* 318 F. 3d 523 (3d Cir. 2003), *Siggers-El v. Barlow*, 412 F. 3d 693 (6th Cir. 2005)

[9] Margo Schlanger, April 2003, "Inmate Litigation", 116 Harv. L. Rev. 1555, 1696 (2003).

Margo Schlanger, "A good administrative remedy system can serve simultaneously to educate upper level officials about what is happening on the agency front lines and to resolve some disputes. Federal law should use the carrot of a district court exhaustion requirement for inmate plaintiffs to encourage states to implement such a system."[9]

H.R. 4109 would eliminate the so-called "needs-narrowness" test in PLRA, that is, the requirement that injunctions and consent decrees be the least intrusive remedy with due consideration of adverse impacts on public safety and the criminal justice system. Elimination of this provision would return us to the state of affairs which existed prior to PLRA wherein incredibly complex orders that made sound management of correctional institutions difficult if not impossible, and correctional administrators spent all their time discerning whether one good practice or another ran afoul of arcane, often contradictory and costly orders. The ability of administrators to innovate, improve and save the taxpayers money in thoughtful ways was impeded and public safety compromised.

The *Benjamin* litigation, which was filed in 1975 in the Southern District of New York and is still pending before Judge Harold Baer, is a prime example of these perverse effects. For decades, the New York City Department of Correction was constrained by consent orders that mandated details as picayune as the precise amount of which brand of cleanser must be used in each gallon of water used to clean the jails. To this day, the court monitor's sanitation expert comments on the color used to paint the Department's janitor closets as well as on issues that are no longer even within the court's jurisdiction.

PLRA provides that a consent order or injunction may be terminated after two years, upon petition from the defendant corrections agency, unless the plaintiffs demonstrate to the Court a continuing and ongoing constitutional violation. H.R. 4109 would change that to return to the days of orders without end – as the *Benjamin* case appears to be even under the current PLRA – and allow courts to set the time when defendant corrections agencies might seek termination, placing the onus of showing the absence of continuing constitutional violations, and that one won't arise in the future, upon the defendant corrections agency. This runs counter to a basic belief that States should be allowed to run their prisons unless the Court removes this power in order to prevent or correct a constitutional violation. The state's power to run its own prisons should not be removed when there are no demonstrable systemic violations of federal rights. No public official can meet the impossible burden of proving what won't happen in the future.

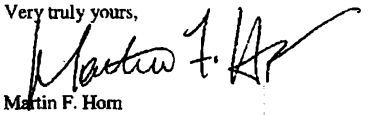
The proposed amendment in H.R. 4109 to remove the PLRA limitations on attorneys' fees is unwarranted. Under PLRA prisoners who prevail are entitled to attorneys' fees capped at 150% of the rate for court appointed lawyers in the federal courts. These rates as currently set are more favorable for prisoners than for wounded veterans who seek recovery for malpractice.

Despite the physical injury requirement, despite the exhaustion requirement, despite the 3-strikes rule, despite the caps on attorneys' fees, inmates still file federal lawsuits against prison officials in staggering numbers. There is no real evidence any of these prudent rules have resulted in the denial of access to the courts on the part of state or local inmates. The concerns supporters of H.R. 4109 express are speculative and theoretical. They offer little or no evidence that the imagined impediments have actually kept anyone from filing a meritorious claim.

[9] Margo Schlanger, April 2003, "Inmate Litigation", 116 Harv. L. Rev. 1555, 1696 (2003).

For those reasons I urge the Congress to recognize the salutary effects in the intended direction achieved by enactment of PLRA and to reject H.R.4109.

Very truly yours,



Martin F. Horn
Commissioner - Departments of Correction and Probation

c: Kimani Little, Minority Counsel
Florence Hutner, General Counsel, DOC
Judy LaPook, Chief of Staff, DOC
Theodis Beck, President, ASCA
Jon Ozmint, Chair, Legal Affairs Committee, ASCA
Eric Shultz, Dir. Legislative Affairs, ACA
file

Ms. WOODFORD. May I say that I have a great deal of respect for Mr. Horn, so I would not want it on the record that I think otherwise.

Mr. GOHMERT. But you did say that a good administrator would not need the PLRA. He indicates he is. Therefore, using deductive reasoning, he must not be a good administrator. But you feel like he is a decent administrator if not good?

Ms. WOODFORD. Yes, I do.

Mr. GOHMERT. Okay. Thanks.

You know, one of the things I have observed just in my few years here in Congress is that there is a tendency to overreact by both Republicans and Democrats. The PLRA, as we have heard from wonderful testimony in the prior hearing—I mean, and I do not mean "wonderful" as in enjoyable. It was not enjoyable at all, but it pointed out some real problems with the PLRA, with the things that we have indicated should be addressed.

But it strikes me, it reminds me of a coach we had back in school that on these bus trips, he'd slam the air conditioning, you know, that knob—he would slam it all the way over to cold. People would freeze to death. He would slam it all the way to hot. People would get too hot. He would slam it back. And by the end of the trip, people were constantly getting sick.

Now, the issue before us is immeasurably more serious than air conditioning, but it reminds me—you know, the PLRA went too far, which it appears it does need some tweaking. And rather than slamming it back to the other extreme and remove the most important provisions entirely, that maybe what it needs here is a little adjustment. Because what I see is, you know, there is potential here, as Ms. Hart pointed out, to give inmates more rights than our military has and than even victims often have. I hate to see an overreaction, because I have seen some good come from this bill.

So, Mr. Chairman, I mean, it is up to you all as the majority party as to what happens, but I would think a little tweaking is more in order than going clear back to the other extreme. And I see my time has expired.

Mr. SCOTT. Thank you.

I would just respond by saying we are trying to work together to see—there appears to be significant common ground, and we want to take advantage of that common ground and make the appropriate adjustments.

The gentleman from Michigan, Chairman Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

This has been a good hearing. I don't think all Democrats and Republicans have a tendency to overreact, especially not on the House Judiciary Committee. Some, there are some, though. There are a few.

So, what, Ms. Woodford, what do you make out of this? What have you heard at this hearing that you would remind us to take with a grain of salt? What have you heard that you would want us to retain in our memory banks as long as possible?

Ms. WOODFORD. Well, I think what I have heard is that prisons—if you haven't been there and experienced them—and some, obviously—I worked at San Quentin 2 weeks after graduating from

college for 27 years. I started as a correctional officer and left as the warden.

If you have not been in these prisons, it is hard to understand the culture and how they operate, and how a different leader can bring—can have transparency or there might not be any transparency, and that the impact of these prisons on our society as a whole is often misunderstood. I used to say to people, we think we lock up people and throw away the key. Not so; 95 percent of them return to our communities much sooner than we think. They are always connected to their families and to their communities through visiting and through writing and through all of those connections that people have. How we treat them—how we treat them—is so important. It makes a statement in our society. It makes a statement to their families and to their children.

We need to be much more involved in what happens. And, unfortunately, prisons get to be the political ball often in budget processes. If you try to say, we need to do this because it is the right thing to do and this society should treat people better, it gets to be you are soft on crime. Well, we need to remember everybody comes home, and they do. And I think that is really what we should remember from this.

Mr. CONYERS. What do you think, Judge? What do you make out of what has happened here today? Is there anything you have heard here that we ought to take with a grain of salt?

Mr. GIBBONS. Well, I have heard from Pennsylvania—and Pennsylvania has been very influential in getting the PLRA passed in the first place. And I have had some experience with Pennsylvania cases. There is a tale of two cities.

The Philadelphia tale is that the city, after litigating for a while, decided on a consent decree which put a cap on a dungeon, Holmesburg Prison. Now, the city could have taken another route and said, well, if you think the conditions are unconstitutional, we will build more facilities, but that would take money. So they opted for a settlement with a cap, and the district attorney didn't like that. And when he became mayor, he was no more satisfied than before, but he did not take the route of raising the money to build constitutionally adequate facilities.

The other city, Pittsburgh—Allegheny County—took a different course. They decided to litigate. And they litigated, and they litigated for 18 years, and they disobeyed court orders. And each time they disobeyed a court order, they were held in contempt and were fined $25,000 to the point where the contempt fines totalled $2 million, 700-and-some-odd thousand dollars. And the city finally realized it might be sounder to build a compliant facility, so they finally built a new jail after 18 years. And this terrible judge, when they built the facility, entered an order giving them back the $2,700,000 to help pay for it.

The PLRA grows out of this Pennsylvania environment. What is clogging up the courts in prison litigation is resistance to spending money on constitutionally adequate facilities, not the wicked Federal judges releasing prisoners willy-nilly.

Mr. CONYERS. Thank you.

The gentleman from California, our only Attorney General in Congress, referenced the intimidation factor. And Mr. Preate, I think, also mentioned it.

How large an influence is that on shaping the relationship between inmates and guards?

Mr. PREATE. Mr. Conyers, you are addressing that to me?

As I said, the vast majority of guards and staff at prisons are fine. They are professional. I have seen that. There are some who are rogues, who are just, you know, very difficult and onerous and retaliatory. That is what creates this, this problem. The grievances flow from that, from one's not being willing to listen to somebody else's point of view. Where you have the professional and courteous interchange, then it is not a problem, but I have to say that it is the subtle things. If you complain about a guard, even sometimes a fellow who is professional, you know, he would make a remark and say, you know, "All right, I have had it with you." And the next thing you know that prisoner is transferred to another institution and loses all the accumulation of perks that he gets. They get their little TVs, that they have to pay for; it is not free. You know, they may lose their single cell. And they've got to go to a double cell. I mean, these cells are small. They are closets. I have seen them. I go into those institutions. And the loss of that is enormous. If that is all you have—if that is all you have and your life is in that cell, in that little cubicle that you have for a container, you have lost everything.

And that is why, you know, there is a perception that prisoners want to get out of prison to go to Federal court, you know, and have a fun time. Not so. The reality is that is not the reality. Most of the prisoners do not want to leave their prisons that they have set up house in because of the accumulation of goodwill that they have there, the staff that they know, the routine that they know. These are all so important to them. That routine is what gets them through every day. You change that routine, you've changed their life. And that is so hard for people on the outside to understand. They do not want to change.

I have a prisoner who was—I got him a new trial in Pennsylvania. I got him a new trial. And he was moved from State prison back to the county prison. As soon as he got back to the county prison, he went up to the judge who was sitting there, standing there taking a guilty plea.

He says, "Judge, can I go back to the State prison?"

He says, "No, I have not sentenced you yet."

He says, "But everything I have, I own is back there." Can't go back.

So it is not the reality to say, "Oh, I want a few days off." And besides that, now we have something called video conferencing where the people stay in the prison and where the judge sits in his chambers or in a facility where there is video conferencing. So there isn't this—there may have been 10 or 15 years ago, but it doesn't exist anymore. That is the real world that I know, Congressman. That is the real world that I know.

Mr. SCOTT. The gentleman's time has expired. We will have an additional round.

The gentleman from California.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Your Honor, some of your comments remind me a little bit of what Justice Scalia once said. He said, when he was growing up, people would see something they did not like or that they thought was wrong, and they would say, "there ought to be a law." Now people look at it and say, "it is unconstitutional."

Some of these questions, it seems to me, are not on constitutional violations but are the question of where a governmental institution ought to put its money and are, at base, political decisions. We may not like it, and we may argue that more funds ought to be spent in one way or another, but, frankly, that is the basis of our system.

And with all due respect, Judge, I don't believe, in each and every instance that you have cited, it is the Federal courts that have the only wisdom and knowledge in these areas.

And Ms. Woodford, I congratulate you on the work that you have done. You have had a tremendous record in the past. Your citation of some of the victims—families' of victims of murder saying they do not want people to be fed is interesting. I have never heard that with all of the families of victims of murder, and I had to deal with a lot of them because my office handled the death penalty cases, and that may be the case. But most of the time, I heard from those people that the court system had become a game that was playing with their lives and that the uncertainty of the system and the fact that they were left out, they were the last ones thought of during the whole process, formed an impression on me that I have never lost.

I remember the night of the execution of Robert Alton Harris. Well, actually, it wasn't the execution. It was the time that he went up four times at the U.S. Supreme Court on successive petitions, each one of them being the same in substance. The U.S. Supreme Court finally took that case away from all Federal courts and retained jurisdiction only to the Supreme Court. It had never been done in the history of the United States before, and it probably will never be repeated. I remember when one of the Federal judges had granted a stay and was asked whether he was aware that he was granting a stay that was of the same substance that the Supreme Court had just denied. And he said, "Yes, I am aware of that." And when I had to report that to the mother of the 15-year—one of the two children killed by Robert Alton Harris 16 years before, she said to me, "Oh, I get it. It is a game."

And I think we ought to treat prisoners humanely, but I think we also ought to understand there is never enough money to do everything we want. And it is a balancing act, and it is a question of, how much do we have? And I mean, we talk about the problems. There are problems. We increased the prison population during the 8 years I was Attorney General substantially, and I am not embarrassed about it because the crime rate dropped by 30 percent and homicides dropped by 50 percent. We were averaging 3,200 homicides per year in California, and 8 years later, it had dropped almost 50 percent. Now there are a lot of citizens that are walking around alive; a lot of families who were not impacted by that. So I do not think we ought to apologize for it. And if you tell me that Federal courts have the right to come in and to demand by judicial

fiat that we release X number of prisoners, I happen to think there is something wrong with that.

And the statements I have heard here from those who are talking about the PLRA restriction on consent decrees, let me just read to you what the law says: Prospective relief shall not terminate, if you go in and you request after 2 years that it be terminated, if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn in the least intrusive means to correct the violation.

That means, if there is a continuing constitutional deprivation or violation, you cannot get it dismissed. There was a suggestion by at least one of the panelists that it is automatic. It is not automatic. And what we tried to do was to say that the Federal jurisdiction goes to the constitutional violation but doesn't go beyond that. And while the Federal courts may have a different idea of how we ought to run our prisons, their idea under our Constitution is no greater than the idea of the elected officials and the appointed officials at the State level.

So let us understand exactly what the consent decree restriction is. It allows you to go in for 2 years to request it, and if the constitutional deprivation has been resolved, then there is no underlying jurisdiction. And that is, I believe, what we were talking about, Ms. Hart, with regard to the reasonableness of the PLRA; is it not?

Ms. HART. That is correct. I think the PLRA tried very hard to make sure that the Federal judges retained the power to swiftly resolve constitutional concerns and retain the power to remedy them. What it tried to do was limit when those court orders went far beyond what was the constitutional requirement because we had very sweeping consent decrees that were micromanaging prisons.

I remember, in New York City, for example, the consent decree was so detailed that it even went down to the level of what kind of cleanser they had to use—Boraxo—to clean the floors and at what strength. And when they moved to terminate it, I remember the head of the Corrections Department saying, "I do not mean to be glib here, but maybe we want to use Mr. Clean."

I think it raises a fundamental question of whether you want the Federal courts in the business of having the Mr. Clean versus Boraxo debate. They should be in the business of enforcing Federal constitutional rights, and that is what the PLRA protected.

Mr. BRIGHT. If I could just respond, too, Mr. Lungren, because I want to make it clear, I was not saying that it was automatic. In fact, I said we spend a lot of time litigating the issue of whether it should come to an end. I don't know of any other kind of injunctive relief where you are constantly litigating whether you still need it.

And I also want to just make this point as someone who has done this now forever. You—if a prison—Alabama, for example, has got a capacity of 12,000. In its old, dilapidated prisons, they have got 28,000 people there. They are incredibly overcrowded. There is no lawsuit to be brought unless you find that things are so bad

that people are having their throats slit, that they are being raped because there is no security, if they are being denied medical care because the whole system has just completely broke down. I see horrendous conditions in these institutions that we say there is no lawsuit to be brought here because, as bad as it is, it is not bad enough to get a Federal court to do anything about it the way the law is today.

So I—we are not fighting about Mr. Clean or Boraxo. We are really fighting about the most basic sort of life issues of whether people are in jeopardy of being killed, of being assaulted or of being assaulted with these socks with padlocks in them and things like that. These are not trivial matters.

Mr. LUNGREN. I wouldn't suggest they are trivial matters, but you ask why you don't—you see this strange situation where injunctive relief can be dissolved later on and you have to argue over it. Well, it is part of the political process. A new administration comes in. A new person is elected. A Governor, they appoint somebody. That is part of the political process. They ought to be able to come up with their new ideas.

Mr. BRIGHT. Right.

Mr. LUNGREN. And my point is, there is nothing that I have been able to find, as much as I respect Federal judges, that grants them the greater wisdom than State judges, than other people of goodwill. And the point is that, under a constitutional system where most of the major decisions are supposed to be made in the political environment in the best sense of the word, I don't want to see that depreciated. And it is our obligation to go out and to speak and to convince the public that we need to spend more money and that, if we intend to put people in prison, they ought to be humane prisons, and that we need to pass laws to make sure that we protect people against sexual assault in prison, and that we prosecute people for that, and that—I mean, we have legislation we passed that has a Federal commission looking at that right now.

So I agree with all of those things, but part of it is the question of whether these decisions are to be made and if, in fact, the Federal judiciary is required to come in, that intervention ought to be only for the purpose that is absolutely necessary. Otherwise, we are distorting our entire constitutional array of powers.

Mr. BRIGHT. And I must say, I think it is. There is tremendous deference that I see to the legislative branch in terms of allocation of funds, to the executive branch in terms of how they run these institutions, but I think we all would agree there is a constitutional line that can be crossed and that, when that line is crossed, a Federal judge has no other choice except, under his oath of office, to uphold the Constitution of the United States and to say this is just beyond the pale, and we do go beyond the pale from time to time.

Mr. LUNGREN. Not beyond the pale. It is unconstitutional.

Mr. BRIGHT. No, I am just trying to summarize.

I am saying, when people are getting raped and beaten up because there is one guard responsible for 500 prisoners; if there are sustained injuries as a result of that, which there were at the Tutwiler Prison for Women in Alabama—people literally could not sleep at night because they were constantly being terrorized because there was no protection. You could not go to sleep because

somebody might slit your throat, somebody might beat you up. You are hypervigilant all the time. And I will tell you, Mr. Lungren, being hypervigilant 24 hours a day will wear you out in a few weeks, but year after year, it will really do serious—and being beaten by other prisoners and being sexually assaulted and having the male guards come in the shower while you are there and sexually humiliate you while you are there, those kinds of things are what I am talking about.

I am not talking about a Federal judge who disagrees with how an institution is run. I am seeing these cases where the conditions in these places are absolutely beyond what this civilized society would tolerate.

You have got to remember that the prisons today are in the condition they are in because Frank Johnson and other judges said, you cannot lock people in what was called a "Draper doghouse" at Draper Prison and shut the door from the outside and put a padlock on it where the inmates could not even stand up and where they are all in there in the dark together and where they had to use a hole in the middle of it for a toilet. I mean, those were the conditions. And that is where the Federal judges played a role, which I think, as we look back on this civilization, if you read David Oshinsky's "Worse than Slavery" about Parchman Farm in Mississippi, that we should thank God that Judge Keady and other people enforced the Constitution when it was clearly being neglected in our country in those institutions. I am sure you agree.

Mr. SCOTT. Thank you.

We are going to have another round of questions. I just wanted to follow through on that, Mr. Bright.

If an injunction were necessary and were put in place and they actually abided by the injunction, it would fix the problem.

Mr. BRIGHT. Right.

Mr. SCOTT. If you ended the injunction, there would be every expectation that they would drift back to where they were; is that not right?

Mr. BRIGHT. Well, let me just say this, too, on this question about whether or not the act is needed.

If you are running a constitutional prison, if you are training your staff so that they are not abusing people, if you are running these places professionally, you are not going to have a lawsuit against you. You are not going to need any act because there is not going to be a constitutional violation.

You are absolutely right, Mr. Chairman. If you bring the facility within constitutional standards, you can always say to the Federal court, "we are doing what is required," and there is no longer any need for Federal court supervision in this situation. But I will tell you the cases that I see—and I want to make one other correction here; the courts are not ordering releases. And no court has done anything lately. There has not been a three judge court that has ordered any limit on population, but the orders that were being entered in some of these places that were at triple or at four times the capacity were limiting the capacity of certain facilities. If you don't—if you want to go above that capacity, then you can use another facility; you can rent a facility; you can make some other arrangements. Generally, that was agreed to by the people who did

it as the solution to those problems. But we have not had, as I said, we have got prisons operating now at more than double capacity with no court orders at all.

Ms. WOODFORD. Congressman Scott, may I respond to the comments of Congressman Lungren? Thank you so much.

What I would like to say—I would like to go to New York and Marty Horn for an example. You have New York, who is closing a prison this year and proposes to close four more in 12 months. They have reduced their prison population and have reduced their crime rate at the same time. So locking people up is not the only way that you can reduce crime rates. And in fact, many researchers say that, in States that have looked at this differently, they are actually having greater reductions in crime rates than States that continue to lock people up.

Corrections is a science. And where people use that appropriately, you get appropriate outcomes. In the State of New York, I think, thanks to Marty Horn, he has convinced people that you close prisons not to save money but to put that money into community corrections, to bring people back to their communities in an appropriate way, providing mental health care and health care and other resources and supervision that is necessary to keep them in their communities. So you can do this responsibly.

I have never heard a judge tell us what to do. I have heard judges ask us what we are going to do to remedy problems. And when the State has failed to come forth with a remedy, then judges go out to experts around the country and bring them into our State to tell us and help us and know what to do to resolve many issues.

That is true with mental health care in our prison system in California. I can tell you that, when I started there in 1978, it was unbelievable to me to see inmates sitting in their cells, screaming, just screaming loudly over and over again and getting no treatment whatsoever. It took litigation to bring about appropriate conditions. And when some of that litigation came to an end, then the State thought they did not need to do it anymore, and we ended up back in the same litigation. I am in my second round of litigation on overcrowding. I am in my second round of litigation on health care, my second round of litigation on mental health care. I have been through litigation on a broken appeals process.

All that I have learned about managing a prison, unfortunately, I learned from the courts. And I am sad to say there is no book on how to be a prison administrator. I learned what a good appeals process was because of a court case called Alonso Day. I learned about how inmates should be treated because of the variety of court cases that came into California.

I will also say, you can be an outstanding prison administrator and have horrible things happen in your prison. I ran San Quentin State Prison. It is a city. At the time that I was there, it had 6,200 inmates and 2,000 staff. I had a school. I had a college program. You have manufacturing. It is truly a city. You cannot know everything that is going on in that city as you cannot know everything that is going on in D.C. today at this moment as we sit here. So it does—having the eyes and ears of many people in our prisons helps us make sure that they are safe and appropriate and running within the law.

So I needed to say that. Thank you.

Mr. SCOTT. Thank you.

The gentleman from Texas.

Mr. GOHMERT. Thank you. I won't be long.

But, you know, one of the things—sometimes folks come into these hearings, and when they are not sworn in, they don't realize that it can still carry a penalty if there is a lack of truthfulness. And I do not think that there is any lack of intent to be truthful here, but the temptation is to make broad, sweeping statements.

You mentioned that crime rates are actually lowering in States that are using other—and I am sure you have something in mind. But what I am seeing is, in States where they have begun to exceed their capacity, like in Texas, and they are starting to have to cut people loose earlier and make parole dates earlier, we are seeing crime rates go back up necessarily when you have high recidivism rates as we have been having in this country.

Of course, from personal experience, you have groups like Prison Fellowship go in, and they actually make a real difference with the mentoring and the follow up and that kind of thing. But what we have been seeing lately from what has been presented to me are crime rates going up, and that includes States that are releasing people.

Is that what you are talking about?

Ms. WOODFORD. Well, I am talking about New York where they are doing it responsibly. They are not doing it as a cost savings as Texas is. I read about Texas. And Texas said they need to reduce the cost of incarceration. New York, on the other hand, is taking the money that they are saving from running prisons and putting it into their community corrections, and they are doing it safely. And I think, you know, New York, as I understand it, is still the safest large city in the country, and their crime rates continue to go down. Everything that I have read—and I read lots of research. I certainly would not have cited that if I had not read that in the research that I do on these issues.

And, then, in California, in a recent case, researchers put forth to the Federal court judges that their study of early releases around the country did not show an increase in crime rates. I am only quoting what they said. I don't—I, personally, did not——

Mr. GOHMERT. Well, we would probably agree that prisons should include things like alcohol and drug treatment to help increase the chances that they can address those issues when they come out——

Ms. WOODFORD. Well——

Mr. GOHMERT. Things like that, correct?

Ms. WOODFORD. I am sorry, Congressman.

Yes, I absolutely agree with that, but you have to look at the reality of the situation.

For example, in California, six out of ten prison admissions are parole violators serving about 3 months. It is very difficult to bring about rehabilitation in 3 months. So, if you are truly interested in bringing about rehabilitation, it should drive policymakers to a different decision about how to handle that issue.

Mr. GOHMERT. And as a judge, I can tell you what I saw repeatedly is that people were able to achieve on probation—where I

could lock people up, up to 2 years, as a condition of probation, they achieved a lot better rehabilitation if the hammer were kept over their heads while they received these other things.

But Mr. Horn points out—and he is certainly quite familiar with New York prisons and jails. But he goes into the problems with like the Benjamin litigation that he cites in his letter as part of the record. It was filed in 1975. Even though the PLRA exists, it has still been ongoing.

And I tell you, one of the things that I see across America as the pendulum swings back and forth is that it gets very close to the end of its swing when you have Federal judges that they appoint masters to run an entity, whether it is a school or a prison. They control the master. They make the rules. And then they review the rules to see if they think they are appropriate. In other words, they become the executive, the legislative and the judicial branch all rolled into one. And it makes some of us very angry because it, in cases where courts do all of those things, for over 30 years, they have just obliterated the Constitution they are sworn to uphold. That is not the role of courts. And yet, that is often the way it has been relegated. The PLRA, obviously, does not take away the ability to have consent decrees.

But my one exposure to socks and locks where I was appointed to represent somebody who was charged with that was, it was completely fabricated, but the idea of a lock in a sock made people so upset that it got a lot of folks stirred up until I helped my client to the end of the case.

Mr. BRIGHT. Well, I will tell you, in the cases I have had, Congressman, I have seen the wounds and I——

Mr. GOHMERT. Have you recommended that they not give people locks that can be used as weapons?

Mr. BRIGHT. Yes. In fact, that is a classic example.

Mr. GOHMERT. Well, then, that ought to be able to be used——

Mr. BRIGHT. I will give you two examples.

We have this prison in Georgia, Alto Prison, which one young man got paroled from there and was going to go back, and he committed suicide rather than go back. That is how the prison was operated. It was known that, if you went there, you were going to get raped. And the saying was, "you could either F or fight." That was pretty much the deal. And this young man who we represented had been beaten by other inmates with locks. He had been beaten so bad that he was in and out of consciousness. So, if he was faking it, he was doing one great job——

Mr. GOHMERT. It is not an issue of faking it, but——

Mr. BRIGHT. He had injuries all over his head. And the argument was that he did not file his grievance within 5 days. He was not conscious during much of that time.

Mr. GOHMERT. And we are wanting to see those restraints addressed so that it does not eliminate somebody's ability to make a grievance and to make a claim. We want to see that it is corrected. That is not the issue.

Also, we are in a hearing where we were allowed one witness, but since you called the system in Atlanta "Mickey Mouse" and "kangaroo court" earlier, you know, the judge in me wants to hear, well, what do they have to say about that allegation?

But, in the meantime, my time is up.

Mr. BRIGHT. Well, I would urge you to look at some of these grievance systems as a judge and to look at how complicated they are. As I said, some of them have five steps and a 2-day statute of limitations.

Mr. GOHMERT. We are looking at them, and we want to fix them.

Mr. BRIGHT. I think you should look at it.

And I would just say, Judge, if somebody writes outside the margin—I doubt if, when you were a judge, you threw a pleading out because somebody went outside the margin. You might have told them to rewrite it, but you did not throw it out. So that tells you, I think, something about how serious we are about this is alerting the court system to what is going on. They were alerted to it. They just didn't want to deal with it.

Mr. GOHMERT. My time has expired, and we do have to go vote.

Mr. SCOTT. The gentleman from California.

Mr. LUNGREN. Well, I went to Catholic school, and so when I wrote outside the margin, the nun did not allow me to get credit for it in my particular case.

And by the way, I think we are going to attempt to address the issue of intimidation or such short periods of time that it is unreasonable. But as I understand the law as it is interpreted, if someone were unconscious, that ability to avail themselves of the grievance would be unavailable under Federal law, and so that would not be held against them. That does not go to the point that we think, maybe, you know, 2 days or 5 days is a little bit too short.

Let me ask the panelists this: There has been criticism from four of you of the current status of the law with respect to the stopping or the dissolving of consent decrees.

With the limitation in the law that I read to you—that is, that prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of Federal right, that it extends no further than necessary to correct the violation of the right and that prospective relief is narrowly drawn in the least intrusive means to correct the violation—what is wrong with the current law in terms of allowing a consent decree to be dissolved?

I wish to start on my right and to move this way.

Ms. WOODFORD. First off, I am not a lawyer, so I am not an expert on this area. I only brought up the consent decree in California because we spent so long trying to figure out whether the consent decree still applied as opposed to just fixing the few remaining items of that consent decree. And I believe it was well over 2 years before we had a ruling. And then the State is now required to fix a couple of remaining items in that consent decree. So it just seemed like time wasted, in my opinion.

Mr. PREATE. Congressman, Attorney General, I did not testify on the consent decree in my testimony. I did not have that when I was Attorney General of Pennsylvania, but you raise some legitimate concerns, some federalism concerns, and I think that it is important that those concerns be addressed in any revision of the PLRA.

We're not looking for a wholesale lifting of the PLRA's requirement, ban on consent decrees, but there has got to be some way

to address the problem because the prisons of America are growing faster than we can build them.

Mr. LUNGREN. And I understand. I am just trying to find out whether there is any problem with the current law with respect to allowing parties to go in—a party to go in and to get the consent decree dissolved within 2 years.

Mr. PREATE. Well, you would have to address that to Judge Gibbons or to Steve Bright because I do not do that litigation.

Mr. LUNGREN. All right.

Judge.

Mr. GIBBONS. Well, my objection to the present law is that it puts the burden on the original plaintiff who had succeeded in getting an injunction which the court determined was necessary to correct a constitutional violation. And instead of putting the burden on the defendant to show that changed circumstances no longer require injunctive relief, it puts the burden on the original plaintiff to say, yeah, the constitutional violations are still a threat.

Now, I was on the court long enough to remember that those kinds of arguments were made with respect to school desegregation decrees all the time.

How is this different? Why should a class action that gets systemwide relief in a prison be anything other than a permanent injunction unless the defendant can show the changed circumstances, like, for example, building a new Allegheny County jail, are sufficient to modify the injunction?

Mr. LUNGREN. Well, I guess it goes to the question of Federalism, which some of us think is important, and also executive versus judicial branch, which some of us think are important under the Constitution.

Mr. GIBBONS. I heard that same argument with respect to school desegregation decrees. The local elected school district is supposed to make these decisions about who goes to what school. That does not fly. You are just tilting the balance, shifting the burden of proof.

Mr. SCOTT. Thank you.

Ms. Woodford, you were challenged on the idea that you could save—do corrections a little more intelligently as you reduce prison sentences. Are there studies that show that drug courts work by giving rehabilitation rather than locking people up, thereby reducing the incarceration rate, save money and reduce crime? Are there studies that show that?

Ms. WOODFORD. Yes, that is true.

Mr. SCOTT. Are there studies that show that if you educate, spend some money in education in prison, you can reduce the recidivism rate?

Ms. WOODFORD. Yes, that is true also.

Mr. SCOTT. So there are a lot of things that you can do to reduce prisons if you use your money more intelligently; is that the point you were making?

Ms. WOODFORD. Absolutely, sir.

Mr. SCOTT. And there are plenty of studies that absolutely document that, without question?

Ms. WOODFORD. Yes, that is true.

Mr. GOHMERT. As a follow-up to that, do you think the Federal Government ought to be the one to tell everybody how to run their prisons?

Ms. WOODFORD. I don't know that I think the Federal Government ought to be the body to tell us how to run prisons, but I certainly think they need to be involved to be sure that we are running them appropriately and constitutionally. And without their intervention, I think that we would not have evolved in our prison system as we have. And without their intervention, I think we will regress if they are not there to oversee that we are operating constitutionally.

Mr. GOHMERT. Well, having now been in Washington as an elected official for 3 years, I can assure you all wisdom does not reside in this town. Thank you.

Mr. SCOTT. Thank you.

I would like to thank all of our witnesses today. This is a very important issue. Keith DeBlasio is in the front row. He was very active in the Prison Rape Elimination Act and has shown a great deal of interest in this issue.

I would like to thank our witnesses for their testimony today. We have a number of letters and statements from various State organizations that we will include, without objection, as part of the record.

Members may have additional written questions for our witnesses, which I would ask you to respond to as quickly as possible so that they may be part of the record. And without objection, the hearing record will remain open for 1 week for the submission of additional materials.

Without objection, the Subcommittee stands adjourned.

[Whereupon, at 6:47 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Statement of the Honorable John Conyers, Jr.

Subcommittee on Crime, Terrorism and Homeland Security
Hearing on H.R. 4109, the "Prison Abuse Remedies Act"
Tuesday, April 22, 2008, at 4:30 p.m.
Rayburn, Room 2141

April 24, two days from today, marks the 12th anniversary of the Prison Litigation Reform Act ("PLRA"). The PLRA has brought about many positive changes. But it also has had some unintended consequences, which we need to address.

The PLRA has stopped many frivolous lawsuits filed by inmates. Unfortunately, it also has stopped some meritorious ones along the way. Juveniles – children serving time behind bars – have been hit especially hard. Children are the most vulnerable group in our society.

We seek to protect them from abuse, including sexual abuse, when it occurs in schools, locker rooms, and homes. We prosecute the abusers, and send them to prison for long sentences.

We have failed, however, to protect children from that same abuse when it happens behind bars. In fact, we often place them in the same adult prisons with child predators.

With the Prison Abuse Remedies Act, which I have cosponsored, we seek to better protect these children by removing the obstacles that have prevented them from seeking justice against those who abuse them or allow them to be abused while incarcerated.

The bill also eliminates the need to show physical injury in order to sue for compensatory damages. Our laws need to acknowledge what we all know:

That substantial damage can happen without detectable physical injury. Rapes that leave no bruises are still horrible crimes that must be punished. Acts that deprive people of First Amendment rights to practice their religion should be exposed and redressed.

Allowing these lawsuits in appropriate circumstances will not open the floodgates to frivolous litigation, but rather will send the message that our prisons, whether run by public or private institutions, must respect fundamental constitutional rights consistent with the protection of inmates and prison personnel and the maintenance of prison security.

Finally, the bill addresses the high procedural bars that have stopped meritorious claims. The PLRA requires inmates to attempt to resolve their problem within the prison system before seeking judicial remedies.

This makes sense. If the prison agrees with the inmate and can fix the problem, it's a win-win situation.

Many prison grievance procedures, however, have short deadlines, unclear rules, and complicated procedures. Many require the abused person to submit her grievance to the very person who has abused her, causing an inmate with a legitimate grievance to avoid complaining out of fear of retaliation.

The Prison Abuse Remedies Act does not eliminate this "exhaustion" requirement. It continues to promote administrative resolution of disputes, but it prevents meritorious claims from being dismissed purely on procedural technicalities.

I look forward to hearing our witnesses discuss these and other issues.

Dear Member of Congress,

We write in support of amending the Prison Litigation Reform Act (PLRA), which was signed into law in 1996. The original intent of the PLRA was to reduce frivolous litigation by prisoners, and it has been quite successful at accomplishing this. We continue to support the core element of the PLRA, which is the screening provision that has proven effective at identifying and throwing out frivolous claims. But after 11 years it is also evident that unintended consequences of the law have left prisoners with little judicial protection against actual incidents of sexual abuse, religious discrimination, and other rights violations.

The time has come for Congress to take another look at this law in order to fix the problems that have resulted in countless horror stories to which we cannot turn a blind eye.

One of the unintended consequences was caused by the "exhaustion" provision, which basically states that prisoners must exhaust all recourse options available to them in the grievance systems in prison before gaining the ability to file a lawsuit in federal court. On its face, this is a good provision – assuming there is a sound grievance process in place and it is followed by prison officials, we believe prisoners must first try to solve their problems there. In reality, however, the grievance processes in many prisons are too convoluted to be workable for a majority of inmates, many of whom are illiterate and/or mentally ill. Further, there are documented incidents where corrections officers have manipulated the process to intentionally prevent inmates from exhausting their options. And many incarcerated individuals, including rape victims, fear for their safety if they file a complaint with prison officials. The result: many prisoners are not able to exhaust their options in prison, and are thus unable to gain access to the federal courts.

Another unintended consequence has been that federal courts are too often powerless to protect incarcerated juveniles, who were never the source of frivolous lawsuits in the first place. Because the PLRA applies to juveniles, its exhaustion provision frequently prevents federal courts from intervening to protect children from abuse and rape in detention. Recently, a state-wide scandal in Texas revealed that for years children detained by the Texas Youth Commission were subject to sexual abuse by staff. But because one of the supervisors, who is blamed for forcing children to perform sexual acts on him also held the key to the complaint box, the children had nowhere to go for help, and the courts were powerless to intervene. Once the scandal broke and the Texas legislature stepped in, detained children and their parents were able to come forward and over one thousand complaints of sexual abuse have now been alleged.

A third consequence has been that victims of religious rights violations, sexual harassment, and even victims of coerced sex are often denied access to appropriate judicial remedies because of the PLRA's "physical injury" provision, which requires a person to prove he or she suffered a physical injury in order to obtain compensatory damages, regardless of whether any mental or emotional injury was incurred. A prisoner who is repeatedly denied the right to practice his or her religion –attend services, meet

with a chaplain, or obtain a bible, Koran, or Torah – cannot prove a physical injury. Likewise, a female prisoner who has her breasts fondled by a male guard may not be able to prove she suffered physical injury. And a child in detention, who is told by a guard that he may not have visits with his mother unless he performs sexual favors for the guard, likely cannot prove a physical injury under the PLRA. These abuses cause suffering that cannot be overlooked simply because they are not physical in nature.

We believe justice and morality require that incarcerated children be exempted from the PLRA, and that the exhaustion and physical injury provisions be fixed.

We must not turn our heads away from abuses such as rape and religious rights violations simply because they occur behind prison walls. We have a moral obligation to protect the rights of those who are most vulnerable in our society. As leaders in the faith community, we urge Congress to determine what fixes need to be made to ensure that the fundamental rights of prisoners are protected, and amend the PLRA.

Sincerely,

Church of the Brethren Witness/Washington Office

Church of Scientology

Friends Committee on National Legislation

Institute on Religion and Public Policy

International CURE

Mennonite Central Committee, Washington Office

National Advocacy Center of the Sisters of the Good Shepherd

National Alliance for Faith and Justice

National Association of Evangelicals

Presbyterian Church (USA), Washington Office

Sojourners

United Church of Christ, Justice and Witness Ministries

United Methodist Church, General Board of Church and Society

STATEMENT OF ELIOT S. SASH, A FORMER FEDERAL INMATE REGARDING THE FEDERAL BUREAU OF PRISONS' ADMINISTRATIVE REMEDY (GRIEVANCE) PROCESS
(28 C.F.R. §§ 542.13; 542.14; 542.15, 542.16, 542.17, 542.18 and 542.19)
IN SUPPORT OF PASSAGE OF H.R. 4109
BEFORE THE HOUSE JUDICIARY SUB COMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

April 22, 2008

INTRODUCTION

Chairman Conyers, Members of the Sub-Committee, I am Eliot Sash, a former federal inmate (register # 34896-054) who served a total of 44 months in four separate federal prison facilities (from 1/2003 to 11/2004 and from 3/2006 to 11/2007). I was released from federal custody on November 30, 2007, and the Second Circuit Court of Appeals vacated the remaining portion of my illegally imposed sentence on December 17, 2007. I submit this written testimony, along with its accompanying exhibits to present a first hand account of how the Federal Bureau of Prisons' (BOP) grievance procedure works, and to share my own personal experiences in attempting to utilize that system (having filed over 70 formal administrative remedies during my incarceration). I urge passage of H.R. 4109 as a start to repairing a system that is broken.

OVERVIEW OF THE BOP ADMINISTRATIVE REMEDY PROCESS

According to the Code of Federal Regulations (CFR), an inmate wanting to grieve a problem in the BOP must first attempt to "informally resolve" the matter with BOP staff, and according to the 28 C.F.R. § 542.13, BOP staff must attempt to resolve the problem. If the inmate is not satisfied with the informal result(s), he or she may then submit the matter for "formal" administrative review by the Warden (or his or her delegate) at the prison facility. Both this "informal" and first step in the "formal" administrative remedy process must be accomplished with 20-days of the incident complained about. If several "matters" are being brought up, each matter must be submitted individually for resolution.

The Warden then has 20-days to respond to the inmate, but may extend this time period by an additional 20-day's. If the inmate disagrees with the Warden's response, the inmate has 20-days from the date of the Warden's response to appeal the matter to the Regional Director. The Regional Director (or his or her delegate) then has 30-days to respond to the inmate, but may extend this time period by an additional 30-day's. If the inmate disagrees with the Regional Director's response, the inmate has 30-days to file an appeal with Mr. Harrell Watts, the BOP's national "Administrative Remedy Coordinator" at the BOP's central offices in Washington, DC. Mr. Watts has 40-days to respond to the inmate, but may extend this time period by an additional 20-day's. Once the matter has been denied relief by Mr. Watts, the inmate may now proceed to file for relief in the United States District Courts.

Based on the language of the C.F.R.:

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER V--BUREAU OF PRISONS, DEPARTMENT OF JUSTICE

PART 542_ADMINISTRATIVE REMEDY--Table of Contents

Subpart B_Administrative Remedy Program

*Sec. 542.**13** Informal resolution.*

*(a) Informal resolution. Except as provided in Sec. 542.**13**(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall establish procedures to allow for the informal resolution of inmate complaints.*

it appears that the majority of inmate grievances would be resolved at this "informal" level since the word "shall" is normally the language of command. But as I shall explain in the next section, the reality of how the BOP operates is a far cry from what Congress has mandated.

HOW THE ADMINISTRATIVE REMEDY PROCESS REALLY WORKS IN THE BOP

An inmate must obtain an "informal" remedy form from their correctional counselor (also know by the inmates as a "BP-8" or "BP-8 ½"). Although the correctional counselor is scheduled to work 5-days per week, the reality is that the BOP is so overcrowded and so short staffed, that the correctional counselors are usually called to cover "security posts." When a counselor is "covering security," although they have not taken a pay-cut to that of a security officer, they (with very few exceptions) refuse to perform their jobs as correctional counselors (the same holds true for any BOP employee assigned outside of his or her normal assignment to "cover security"). The correctional counselors are the only personnel who can issue the administrative remedy forms for any level (informal, Warden, Regional or Central Office). The 20-day time clock ticks away while an inmate waits for his correctional counselor to return to his or her job to issue the proper remedy forms. Attempting to obtain the administrative remedy form(s) from another correctional counselor usually is met with a response of "I'm not your counselor. You will have to wait for your counselor to return."

Once an inmate finally obtains the informal remedy form, he or she must then return it to the correctional counselor who is required to obtain the response. Depending on the institution, a response can be "expected" anywhere from 3 to 7 days. However, as I will explain in the next section, my own personal experiences are quite different from this. In the meantime, the 20-day time clock ticks on.

The truth of the matter is that the BOP correctional counselors have no intention of having the problem resolved (and if the problem is with the correctional counselor, an inmate has nowhere else to go). The BOP staff member who provides the answer to the informal remedy (except in very rare occasions) never meets with the inmate to discuss the matter, nor attempts to ascertain what prompted the inmate to file the grievance. In almost every case, the answer is either non-responsive, or a complete denial of relief. And in cases where an inmate complains about BOP staff misconduct, the informal remedy is given to that BOP staff member complained about so they can provide their own response (which now sets the stage for retaliation – a specialty of BOP employees – please note the 2-paragraphs in this testimony and their referenced exhibit titled "Allenwood Legal Call Administrative Remedy" in the section labeled "Personal Experiences With The BOP's Administrative Remedy Process").

Once the informal remedy is returned to the inmate (by institution mail), the inmate must once more seek out the correctional counselor to obtain the first formal administrative remedy form (Warden's review – also called a "BP-9"). This is an NCR form with 4-parts, but with limited space to provide the grievance. An inmate is allowed to attach one (1) additional 8 ½ by 11 sheet, but must provide 4-copies at their own expense (copies cost on average 15¢ each – please see Allenwood Commissary Sheet attached as an exhibit. And most inmates earn 12¢ per hour – please see: 28 C.F.R. § 545.26(b)) as well as a copy of the completed BP-8. Inmates can also present exhibits, but must include 4-copies of them as well, also at their own expense. The inmate then presents this completed set to the correctional counselor for submission to the institution's legal department which assigns the "administrative remedy number." Then the administrative remedy form with its attachments is presented to the Warden's office for a response. All of this must take place within the 20-day time period from the date of the incident that gave rise to the grievance.

Now that the Warden has received the request for formal administrative review, instead of investigating the problem, or investigating why BOP staff did not make a good faith effort to resolve the problem as required by 28 C.F.R. § 542.13, the Warden's staff tries to reject the remedy on any technicality they can find (as will the Regional and Central offices also try to reject the remedy on a technicality). Assuming that the formal administrative remedy passes muster, the Warden has 20-days from assignment of the number by the legal department to provide a response. But at the Warden's "discretion," this can be extended by an additional 20-day's.

Once the response is received by the inmate (usually 2 to 7 days after the date on the reply), if the inmate is "dissatisfied" with that response, the inmate must once more track down the correctional counselor to obtain the Regional office appeal form (also known as the "BP-10"). The BP-10 (4-part NCR form) has the same amount of room as the BP-9 for filing the grievance, and as with the BP-9, one additional 8 ½ by 11 sheet may be attached (same as with the BP-9, 4-copies must be provided at the inmate's expense along with a fully completed copy of both the BP-8 and BP-9 and 4-copies of any previously submitted exhibits). This "package" must then be mailed at the inmate's expense to the appropriate Regional office. The inmate has 20-days to file the Regional appeal. However, this 20-day time period is from the date of the Warden's response, not the date the inmate received it, and

includes physical delivery by the U.S. Post Office to the Regional office (delayed mail – no fault of the inmate - is a reason for rejection).

As with the BP-9, once the BP-10 is "timely" received in the Regional office, the first thing the BOP staff does is search for any technicality to reject the administrative remedy. If no technicality can be found, the next thing the BOP staff does is search for any reason at all to deny the inmate relief (including providing a non-response to the issue raised). The Regional office has 30-days to respond to the inmate, but may extend this 30-day period by an additional 30-day's.

Once the Regional office responds to the inmate, (denying relief in almost every case), the inmate has 30-days to appeal to Mr. Harrell Watts at the BOP's central office in Washington, DC (from the date of the Regional Director's denial of relief). As with all the other administrative remedies, the inmate must once more track down the correctional counselor to obtain the final "formal" administrative remedy form (known as a "BP-11"). The Regional Director's response is normally received 5 to 10 days after the date on the response. As with the BP-9 and BP-10, the amount of space on the BP-11 is limited, so the inmate may attach one (1) additional 8 ½ by 11 sheet of paper. As with the BP-9 and BP-10, 4-copies (at the inmate's expense) must be provided as well as a copy of the completed BP-8, BP-9 and BP-10 and 4-copies of any previously submitted exhibits. This "package" must then be mailed at the inmate's expense to Mr. Harrell Watts at the BOP's central office in Washington, DC. The "package" must be received by Mr. Watts' office within the 30-day time period (again – delayed mail is no excuse – remedy rejected).

As with the BP-10, assuming that there were no mail delays, the first thing Mr. Watts' staff does is look for any technicality to reject the filing. If no technicality exists, the next thing the staff does is look for any technicality not to provide relief (as with the Regional office, providing a non-response to the matter raised). Mr. Watts has 40-days to respond to the inmate, but may extend this by an additional 20-day's.

It is my own personal experience that both the Regional office (Northeast Regional Office in Philadelphia) and Mr. Watts in Washington constantly avail themselves of this extra time to respond to an inmate (thereby delaying the inmate from seeking U.S. District Court intervention by at least 4-months). This creates a major problem if the inmate is appealing the denial of proper medical treatment and care.

PERSONAL EXPERIENCES WITH THE BOP'S ADMINISTRATIVE REMEDY PROCESS

Administrative Remedies at MCC-NY:

From January 2, 2003 up to January 16, 2004, I was incarcerated at the Metropolitan Correctional Center (MCC) in New York City (Manhattan). The inmates had another translation for MCC – Metropolitan Concentration Camp (based on the unprofessional and poorly trained employees at this institution). For about half my "stay," my correctional

counselor was David Lewis (who was eventually fired for smuggling cigarettes into the institution to sell to the inmates). Mr. Lewis was scheduled to work from 7:30 AM to 4:00 PM, Monday to Friday. Although Mr. Lewis would arrive to work on time, he would order that the housing unit be locked down until 10:30 AM so he could recite his "daily prayers" in his office undisturbed by any inmates. From 10:30 AM to 11:00 AM, inmates could see Mr. Lewis to address any "concerns" they had. From 11:00 AM to 11:30 AM, Mr. Lewis was at lunch (having one of his "special" inmates cook for him). From 11:30 AM to 3:30 PM, Mr. Lewis played dominos with some of the inmates on the housing unit. If any inmate approached Mr. Lewis for any reason, the standard response was "get away from me or I will throw you into the SHU (Special Housing Unit or solitary confinement). At 3:30 PM, the unit would be locked down again in preparation for the change of shifts and the 4:00 PM inmate count.

Obtaining forms from Mr. Lewis was a near impossibility. Every request was met with the same response "I ran out" or "come back tomorrow." Luckily, there was another correctional counselor, Mr. Espinet, who worked on the weekends in another housing unit, Mr. Espinet would come to my housing unit and provide the inmates with what David Lewis wouldn't (forms, writing paper and envelopes, hygiene supplies, etc.).

Because I was on a special diet, I was required to have 2-containers of milk each morning with my breakfast. One morning, no milk was sent up (the facility forgot to order enough milk and ran out). I immediately notified the security officer on duty who called to food service who confirmed that they simply ran out of milk. So I obtained a BP-8 from my then correctional counselor (Ms. Wanda Wingate), filled it out and returned it to her. Later that afternoon, Ms. Wingate returned the BP-8 to me with the response from food service that they had run out of milk, as the security officer had told me.

I decided that the Warden needed to be apprised of this matter. I obtained the BP-9, filled it out, attached a copy of the BP-8 and gave it back to Ms. Wingate. Three (3) weeks later I received a response that "the facility records showed that they never ran out of milk, and that if my breakfast was missing something that I had to report it to the security officer on duty." It was obvious that nobody in the Warden Morrison's office even bothered to read Ms. Wingate's handwritten response that the facility ran out of milk, and that this confirmed what the security officer had told me that morning. This response prompted me to seek review from the Regional office in Philadelphia.

Ms. Wingate provide me with the BP-10, I made my required copies and stated that the response from Warden Morrison's office was ludicrous in the fact that no one even looked at BP-8. The response I received never addressed the fact that the Warden's office didn't perform a proper investigation, but rather stated that if I was in fact shorted the milk, then food service made an appropriate substitution. My opinion of this response was that the BOP must employ fantasy writers to respond to inmate's grievances. Furthermore, the Regional office "needed" the additional 30-days to respond to this grievance.

By the time the Regional response arrived, I had already been transferred to the Metropolitan Detention Center in Brooklyn, New York (a small step above MCC, but not by much). I was designated as a work cadre inmate and assigned to the cadre housing unit. Once I received the "fantasy" Regional response, I obtained the BP-11 from Correctional Counselor Jeffrey Atkins (who would 2-months later falsify documents and have me thrown into the SHU for helping illiterate inmates fill out their administrative remedies although my actions was in full accordance with 28 C.F.R. § 542.16(a) and (b)).

Once Mr. Watts received my BP-11 "package," his staff immediately rejected it on the technicality that the BP-9 was illegible. I was asked to resubmit the "package" with a legible BP-9 within 15-days (although 8 days had passed since the rejection notice was printed and was received by myself). So I complied with this request (although all formal administrative remedies and responses are required to be available through the BOP's SENTRY system pursuant to 28 C.F.R. § 542.19. SENTRY is the computer system that runs the BOP).

Three (3) weeks later I received my "package" back, once more reject with a claim that I "must" submit the exhibits I reference in the BP-11. So I wrote back to Mr. Watts explaining that I had no idea what he or his staff were referring to. I stated that all they had to do was look at all of the documents I sent in and everything was there. I specifically pointed out that I did not disturb the staple his staff placed in my submitted documents so he could see for himself that I properly submitted everything that was required. I also explained that if his staff would only try and present a "good faith" effort into granting relief, that they might save the BOP considerable money and eliminate the flood of administrative remedies filed by inmates every year. Needless to say Mr. Watts never responded to my comments, and denied me relief 45-days later.

Overall, the administrative remedy process, that started out very efficiently with Ms. Wingate at MCC took just shy of 240-days (8-months) to complete. And the matter of the failure of MCC to order enough milk, the fact that Warden Morrison never properly investigated the claim; that the Regional Director came up with some phantom substitution; or the rejection game-play of Mr. Watts in the Central office were never addressed.

As I stated in my introduction, I was housed at 4-separate BOP facilities during my incarceration – MCC from 1/2/03 to 1/16/04, MDC from 1/16/04 to 11/22/04 and again from 3/6/06 to 12/6/06, at the Low Security Correctional Institution Allenwood (LSCI-Allenwood) in White Deer Pennsylvania from 12/6/06 to 10/2/07 and at Toler House (GMX) in Newark New Jersey from 10/2/07 to 11/30/07. During these periods, I filed over 70 formal administrative remedies (although since Toler House was a Halfway House, nothing came up that was not able to be resolved informally).

Medical Administrative Remedy at LSCI-Allenwood:

The most egregious and serious of the administrative remedies involved required medical treatment for two (2) spinal injuries I suffered in a head-on collision on January 29, 2005. At the time of my re-incarceration for an alleged violation of supervised release (on 3/6/06), I was undergoing physical therapy three (3) times per week, and had just been approved for an Electromyography (EMG), to be followed by a series of Epidural Injections into the spine.

Held in Pre-Trial detention at MDC, I was technically under the control of the United States Marshal Service. Medical care for my spinal injury was denied (except for prescribing failed anti-depressants, supposedly for the pain). I was informed by a Unit Manager (Mr. Benius Beard) that the U.S. Marshals instructed the BOP that they will not pay for any medical treatment of inmates unless it is a life or death matter (i.e.: heart attack). Because of this, I would not receive any medical treatment until I was transferred to my permanent facility, unless I wanted to be designated work cadre again. Since I had already had the "work-cadre" experience, I chose to be transferred.

On December 1, 2006, I was notified that I would be transferred to LSCI-Allenwood, and was told by BOP Case Manager Ms. Small that this was a "medical designation." On December 6, 2006 I was in fact transferred, and upon arrival found out that not only wasn't LSCI-Allenwood a medical facility, but that the medical staff (most of whom are not licensed to practice medicine in the State of Pennsylvania, or anywhere else for that matter) would not provide any treatment for my spinal injuries except to "experiment" with other "failed" anti-depressants. Needless to say, I began filing administrative remedies. At each level, I was denied relief. Luckily for me, the process actually moved rather quickly, and I was able to file in the U.S. District Court for the Middle District of Pennsylvania for injunctive relief.

However, the U.S. Attorney's office promptly opposed my getting relief by using a Physician's Assistant from another facility who never examined me to provide a declaration to the District Court that I was receiving "conservative" treatment. The litigation went on for months with the U.S. Magistrate recommending that the Court grant the Government's motion to dismiss, but with U.S. District Court Judge Sylvia Rambo agreeing that the only way I could prove ongoing injury was to be granted the injunctive relief I sought. Judge Rambo Ordered that Dr. Brady, M.D. respond by September 24, 2007 regarding the treatment I was receiving. However, pending the declaration from Dr. Brady, I was notified of my transfer to the Halfway House effective October 2, 2007. That rendered my lawsuit for injunctive relief moot as the Halfway House was required to allow me to see my own doctors and to resume treatment where I left off because of my re-incarceration. Needless to say, as soon as I received the necessary clearances from the Director of the Halfway House, treatment of my spinal injuries resumed and the pains that I endured for almost two (2) years were eased.

For two (2) months, I underwent preparation for spinal surgery. On my first visit to my Orthopedic Surgeon (who just happens to be a contract BOP Orthopedic Surgeon), one question to me was "didn't they send you for an M.R.I.? The answer of course was no. Dr. Archer could only shake his head. M.R.I's were ordered of the Cervical and Lumber Spines. A visit to my Neurologist set up an appointment for the E.M.G. which showed severe nerve damage, caused by the lack of treatment at the hands of the BOP. Spinal surgery was scheduled after my release from the Halfway House on November 30, 2007 – three (3) each for the Cervical Spine and two (2) each for the Lumbar Spine (a third Epidural Injection for the Lumbar Spine is on hold). For the first time in years I am out of pain.

My Orthopedic Surgeon, Neurologist as well as the other doctors I have seen are all lined up to testify against the BOP in a lawsuit for damages due to the medical malpractice of the BOP doctors and medical staff at LSCI-Allenwood.

The fact that I had to endue unspeakable pain while exhausting administrative remedies before I could file in Court for judicial intervention just to get Dr. Brady and his staff to even make minimal attempts to treat me demonstrates that there is a real need out there for reforming the PLRA. If I had "three strikes" on me for what is termed a "frivolous" lawsuit at the drop of a hat by some judges would have barred me from seeking any judicial intervention (as pain does not qualify as "imminent danger" – an exception to the "three-strikes" rule).

Administrative Remedy Exhibits:

I place into this testimony three (4) .pdf files as exhibits. The first one shows how the BOP, even when granting relief in an administrative remedy (Exhibit # 1 – MDC Mail Forwarding Administrative Remedy), still doesn't afford the inmate relief. Warden Hogsten granted my relief for the failure of MDC-Brooklyn to forward my legal mail indefinitely, and for the failure to forward general mail for 30-days as required by 28 C.F.R. §§ 540.25(e) and 540.25(f). In the response from Correction Counselor Jeff Solomon on the BP-8, this career BOP employee did not know the mail forwarding rules, did not bother to research the mail forwarding rules, and just made up what he considered to be the correct answer ("It is my understanding that mail forwarding is not required for regular mail"). Mr. Solomon doesn't even address the problem that gave rise to the remedy being filed in the first place, the non-forwarding of legal mail from the U.S. District Court.

And although Warden Hogsten "granted" me the relief sought, this "relief" was not even worth the paper it was written on. In April 2007, once more I discovered that MDC-Brooklyn was not forwarding my legal mail (causing me to miss a deadline from the U.S. Court of Appeals from the Second Circuit). I personally spoke to Warden Hogsten, and upon

her personal instructions, filed the BP-10 to the Region. As is evidenced by the response, my BP-10 was rejected for "being untimely." Nowhere does the Region address the fact once "relief" is granted, it normally would not be appealed, at least not by ant sane individual. And the Region did not address that the BP-10 was filed under the specific instructions of Warden Hogsten. This is a prime example of how all the BOP does is try and find any possible technicality to deny relief to an inmate.

The two (2) medical administrative remedies (Exhbit # 2 – MDC Medical Co-Pay Administrative Remedy and Exhibit # 2 – Allenwood Medical Co-Pay Administrative Remedy) are both prime examples of how the BOP wastes money. Each of these remedies were filed to protest a $2.00 medical co-pay that was charged to my commissary account. At MDC, Dr. Borecky actually falsified my medical records claiming that he examined me and prescribed the medication (with 5-refills which qualifies this as "chronic" and exempt from the co-pay). What actually happened was that I told Dr. Borecky that I did not get my Nasal spray and he wrote the prescription later that day (I was in the housing unit when I saw the doctor come in and approached him about it. I never went to the medical unit, and Dr. Borecky never examined me, he just wrote the prescription).

In the LSCI-Allenwood administrative remedy, I was seen 4-times for a problem that was not properly treated for more than a month (June to July 2007). Because it was a respiratory infection requiring antibiotics, this made it exempt from the co-pay (and since each of these visits also included the constant complaint regarding the non treatment of my spinal injuries, they too qualify as being chronic and also exempt from a co-pay). The BOP has spent well over $1500.00 in man-hours in order to keep $4.00 from an inmate who earned 12¢ per hour ($2.40 per week) when not on medical idle (which I was on for the majority of my "stay" at LSCI-Allenwood). Both of these claims are at the Tort Claim level where the BOP is expending more taxpayer money, all over $4.00 (now $30.00 total for the Tort claims). The BOP has no fiscal responsibility.

For the fourth exhibit I submit my administrative remedy regarding the requesting of an "unmonitored" legal telephone call to my appeals attorney (the Federal Defender's Office in New York) to BOP Case Manager Kendahl Gainer (Allenwood Legal Call Administrative Remedy). As this progressed, Ms. Gainer actually committed both Federal and State felonies by "listening" to my one (1) minute telephone call to my attorney. When I submitted the BP-8 to Correctional Counselor Charles Smith for "informal resolution," Mr. Smith gave it to Ms. Gainer so she could reply to my allegations. Ms. Gainer later retaliated against me by delaying the processing of my "Halfway House package" so that I only received 58-days placement rather than the 4-months placement promised to me (and only 1/3 of the 6-months placement mandated by Congress in 18 U.S.C. § 3624(c).

As this matter progressed to the formal administrative remedy level (Warden – BP-9), the file was submitted to Unit Manager Ed Netzband (Ms, Gainer's boss and the person who should have handled responding to the BP-8). When Mr. Netzband realized that I probably could have Ms. Gainer arrested and prosecuted for her actions, he immediately called me into his office (in another unit away from Ms. Gainer's office) and asked me what happened, and what I wanted to resolve the matter. I explained to Mr. Netzband that all I needed was the unmonitored attorney telephone call and that was arranged for the next morning. During our conversation, Mr. Netzband told me that Ms. Gainer was "a very stupid girl." I was taken aback by this, a BOP employee labeling one of his subordinates as being "stupid," especially saying this to an inmate. Ms. Gainer has more troubles as recently she submitted a false declaration to the United States District Court for the Western District of Pennsylvania regarding another inmate at LSCI-Allenwood and her retaliation against and falsification of this inmate's records (I was asked by the inmate's counsel to submit an Affidavit detailing my experience with Ms. Gainer along with the submitted exhibit).

Additional Problems at MDC-Brooklyn:

During my second "stay" at MDC-Brooklyn (3/7/06 to 12/6/06), the problems in obtaining administrative remedy forms were myriad. Our Correctional Counselor, Mr. Martinez, was on the "response unit" team for the facility. That meant that he was gone at least one day per week for "training" (and was gone for 2-weeks in May to be at Lewisburg Penitentiary for additional training). Next, because on the shortage of staff in the BOP, Mr. Martinez had to cover two (2) housing units. So he was only in our unit a maximum of 2-days per week (unless he was covering a security post, then we didn't see him at all). And Mr. Martinez was also the "firearms officer" for MDC-Brooklyn, which mandated that he was at the pistol range for the months of June, July, August and half the month of September "qualifying" all 500 plus employees of MDC in their annual shooting scores. So our unit was without a correctional counselor for these times.

The counselor from across the hall, Mr. Murray, had no problem in coming into our unit, writing incident reports if your bed was not made by 8:30AM (we were all pre-trial inmates, not sentenced prisoners and these incident reports could affect a person's classification and prison assignment if convicted by raising their custody and security score). But if you asked Mr. Murray for an administrative remedy form (or had some other problem that needed to be addressed by a correctional counselor), the standard reply was "I'm not your counselor. You have to wait for Mr. Martinez to return." On top of all this, I filed a BP-8 on April 20, 2006 regarding my special diet (another problem with the milk, this time it was spoiled and not replaced). I am still waiting for that response to be returned to me, even though I am no longer an inmate.

My first "stay" at MDC (1/16/04 to 11/22/04), as I was assigned to the work cadre unit, our Unit Manager was a Mr. Shacks. He had just been promoted to the Regional offices in Philadelphia. Mr. Shacks called a "town hall" meeting (where all the inmates gather around for announcements from the unit team or from other staff. Mr. Shack told each of the work cadre inmates that is any BP-10's came across his desk from MDC, they would be automatically rejected or denied. That didn't deter me, but it sure deterred a lot of other inmates from filing for redress of their grievances.

Now, the newest trick of the BOP at LSCI-Allenwood is to refuse to answer administrative remedies at the Warden's level. The legal department will not assign a number to a BP-9, and the inmate is called to the Associate Warden's office to "retrieve" his forms. And at MCC-New York, Warden Morrison's version is to place the inmate into the SHU while his administrative remedy works its way though the system ("for the inmate's own protection from retaliation from staff" – and the Warden's actions aren't retaliation?).

I hope that my explanation of how the BOP Administrative Remedy Program actually works is informative without being too repetitive. I have tried to keep this testimony at its barest minimum. I consider myself a fairly intelligent person and that I actually knew the rules of the BOP better than most of its employees. Yet I could not obtain relief, even when specifically citing the Code of Federal Regulations, the laws enacted by Congress that govern how the BOP must operate. Reform is needed and it is needed today. Other inmates have asked me to provide this Honorable Committee with their administrative remedies, and I will do so upon the request of any member. H.R. 4109 is a good first start to resolving some of the problems with today's prison system. I respectfully urge its passage.

Respectfully submitted

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WASHINGTON LAWYERS' COMMITTEE
R CIVIL RIGHTS & URBAN AFFAIRS

Testimony in Support of
H.R. 4109 – Prison Abuses Remedy Act of 2007

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The D.C. Prisoners' Project is a section of the Washington Lawyers' Committee for Civil Rights & Urban Affairs. Our Project represents District of Columbia prisoners held both locally in D.C. jail facilities and those held in the Federal Bureau of Prisons ("BOP"). All people convicted of felonies in D.C. are sent to the BOP. D.C. prisoners comprise approximately three percent of the BOP population and are housed in almost every BOP facility nationwide.

We advocate for appropriate medical care, protection from violence, and access to basic constitutional rights through litigation and non-litigation means. The Prisoners' Project was an independent organization formed over twenty years ago. In 2006, the Project merged with the Washington Lawyers' Committee, which has been representing both individuals and groups seeking to vindicate their civil rights for forty years. We have extensive experience advocating and litigating on behalf of D.C. prisoners, who are housed locally and in the BOP.

While testimony by other organizations and individuals will provide complete analysis of the Prison Litigation Reform Act ("PLRA") and the Prison Abuse Remedy Act of 2007, our testimony is based on our experiences in litigation and advocacy proceedings. We will focus on the effectors of the PLRA on our clients and in cases with which we are familiar. Specifically, we address the enormous barriers to fulfilling "proper exhaustion," and why it is not reasonable to expect the majority of inmates, including those most vulnerable to mistreatment, to accomplish this; the non-uniform, complex nature of most grievance processes; the judicial waste created by litigating issues that do not address the merits of prisoners' civil rights cases; and finally, the impact the PLRA's fee limitations has on the broader civil rights legal field.

One common misperception is that prisoners purposely avoid or ignore easily followed grievance regulations. This is simply not true. Our organization spends significant amounts of time and money (in printing, mailing, and telephone costs) explaining to people how the process works. We send guides for no less than five different grievance processes to our clients, depending upon which facility the client is in.

Prisoners Generally and Low Literacy Levels

Before even beginning to look at a facility's grievance policy, it is important to note that most prisoners are poorly educated, without legal sophistication, and often of limited literacy.[1] In

1 The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the

D.C., the average reading level of prisoners is seventh grade.[2] As of January, 2008, 58.3% of male prisoners and 43.3% of female prisoners in DC had not completed high school. Another 28.4% of men and 28.0% of women had just completed high school, with no additional education.[3] Sadly, in D.C. as in many parts of the country, even having completed high school is no guarantee of reading ability. In the 2005-06 school year, two thirds of tenth graders in DC only were able to read at a below basic or basic level.[4]

Many of the D.C. prisoners also have serious mental health disabilities. In June 2000, the D.C. Department of Corrections provided mental health therapy or counseling to twenty-one percent of its population. Nationally, thirteen percent of state prisoners received therapy or counseling.[5] Officials knowledgeable about the jail population have conservatively estimated that twenty percent of people housed in the jail have significant mental illnesses. Such disabilities further complicate the ability of prisoners to access the grievance procedure and follow its byzantine requirements.

Finally, given the changing characteristics of our country, many prisoners do not speak English as a first language, if at all. Nine percent of the D.C. metro population of our region is of limited English proficiency.[6] Twenty-percent of our region's population speaks one of over 100 languages other than English in the home.[7] Others are deaf and may not be able to communicate by written means.[8] For all these prisoners, following a complex grievance process in a manner that is technically perfect is a virtual impossibility.

The D.C. Grievance Policies Do Not Make Sense

Given these characteristics of the people who are incarcerated in Washington, DC, most prisoners cannot understand the grievance policies as written. Frankly, taken as a whole, the policies do not make sense. I have attached the relevant policies to this testimony.

lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17- 19 (1994) (http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102).

2 *Comprehensive Reentry Strategy for Adults in the District of Columbia*, 5 (2003) (http://www.csosa.gov/reentry/Comp_Reentry_Action_Plan.pdf).

3 *DC Department of Corrections Facts and Figures* (January 2008) (http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/populationstats/dcdepartmentofcorrectionsfactsnfigurcsjan08v2.pdf). Statistics kept by the Department of Corrections on its website measure self-reported grade completed, not reading or writing proficiency level.

4 *A Five-Year Statistical Glance at D.C. Public Schools: School Years 2001-02 Through 2005-06* (2006), 36.

5 *Comprehensive Reentry Strategy for Adults in the District of Columbia*, 5 (2003).

6 Audrey Singer & Jill H. Wilson, Brookings Inst., *Polyglot Washington: Language Needs and Abilities in the Nation's Capital*, 10 (2004). (www.brookings.edu/reports/2004/06washington_singer.aspx)

7 *Id.* at 3.

8 For example, see the case of *Heard v. District of Columbia*, 2006 U.S. Dist LEXIS 62912 (D.D.C. 2006). Joseph Heard is a deaf man who was held illegally in the D.C. Jail for 669 days and was unable to communicate with anyone the entire time, as he is deaf with no ability to communicate through reading, writing, or lip-reading. *Id.*

Locally, there are two jails that serve the jailed population of Washington, DC. One is run by the D.C. Department of Corrections ("DCDC") and one is run by the private corporation, Corrections Corporation of America, Inc. ("CCA"), under contract with DCDC. Local prisoners may be housed in either facility, and are often transferred back and forth.

Not only does each facility have a separate grievance policy, the policies contradict each other. The CCA facility policy states the following appeal process:

> If the inmate is not satisfied with the warden's response, the inmate may appeal to the contract monitor within five (5) days of receipt of the warden's decision. If the inmate is not satisfied with the contract monitor's reaponse [sic], the inmate may appeal to the director of the DC Department of Corrections within five (5) days of receipt of the contract monitor's decision.

However, the DCDC grievance policy, contains the following statement, "If the inmate is not satisfied with his or her response from the [CCA facility] Warden he or she may file an appeal to the Deputy Director with in five (5) calendar days." Thus, there is no possible way that any person housed here in Washington, D.C. at the CCA facility could possibly exhaust his or her grievance appeals according to *all* applicable policies. The matter becomes even more complex if the inmate's issue happened at the D.C. Jail, and the person was transferred to the CCA facility while a grievance was pending or before he had an opportunity to submit the grievance. Although this is a common occurrence, there is no policy directing either inmates or corrections officials on how to handle that situation.

Secondly, neither policy provides for a confidential means of filing grievances outside the facility in cases of sexual abuse. In fact, neither policy mentions sexual abuse at all. There is a separate DCDC policy on sexual abuse, but it is cataloged in the section of the policy manual dealing with Human Resource Management. In that policy, there is a statement that "The inmate may file the complaint [of sexual abuse, harassment, or misconduct] directly with the Director as an 'Emergency Grievance' in accordance with the emergency provisions outlined in [the DCDC grievance policy.]" However, nowhere does this policy make clear whether or not this alternative reporting procedure would satisfy the applicable grievance procedures. In the absence of any affirmative statement that it does, it is reasonable to assume that a court later could determine that it does not. Therefore, a prisoner would be well advised in both facilities to also follow the grievance procedure. At both facilities, that would mean beginning the grievance process with a complaint to the in-facility grievance coordinator, a person who works daily with the correctional officers.

Problems With the Grievance Process Exists Even in the BOP

Certainly, not every prison or jail grievance policy is as confusing as the system in D.C. Comparatively, the BOP's system is well written and understandable. However, it still poses serious obstacles for the DC Prison population for having very serious problems considered by a court.

Take the recent decision in one of our organization's ongoing cases, *Womack v. Smith, et al*, Civil Action No. 1:06-CV-2348 in the Middle District of Pennsylvania. It is undisputed that Federal Bureau of Prisons officials held Mr. Womack held in restraints for twenty-six days straight, with out interruption. These restraints consisted of steel wrist and ankle cuffs, which were joined together and to another chain around his waist. To be clear, although the BOP

defendants refuse to concede this point, Mr. Womack was completely unable to wipe himself after defecating. Without a shower, without being released from chains, Mr. Womack sat like that, in feces, for twenty-six full days.

Once he was released from restraints, he was kept alone in a cell, guarded by the very officer who originally ordered him restrained. Mr. Womack is also completely illiterate. He can write his name, but nothing else. He cannot read a single word, including his own name. After he was placed in a cell with a cellmate, BOP officials waited fifteen days to give him the forms or paper, he needed to begin the grievance process. With his cellmate's assistance, he submitted the first step of the grievance process twelve days later. His grievance was denied, stating that his restraints were proper. He appealed with the help of his cellmate, through each step of the BOP's four-part process.

He then filed a lawsuit. On Defendants' Motion for Summary Judgment, the judge found that Mr. Womack had not met the PLRA's exhaustion requirement, since the twenty day time limit to file his initial two grievances began to run the day he was released from restraints. Because of the PLRA< it did not matter to the court that during these twenty days, Mr. Womack – who is illiterate – was completely unable to file a grievance. Because of the PLRA, it did not matter to the court that when Mr. Womack was finally placed in a cell with a literate cellmate, and was finally provided access to grievance paperwork, he promptly filed a grievance with the facility and timely appealed every single denial of that grievance.

Mr. Womack will be appealing this ruling, but it is one example of a very serious situation that was not fully examined by the court because it was blocked by the exhaustion requirement. It is also an example of "the tail wagging the dog," where the rule becomes more valued than the substantive right at issue.

The PLRA Wastes Judicial and Legal Resources

Contrary to the "intent" of the PLRA, we have found that the hyper-technical PLRA exhaustion provision has proven to create a blockade for courts to deal with the merits of cases, and wastes judicial resources by creating its own sub-litigation. For instance, in the twin cases of *Jackson v. District of Columbia*, 254 F.3d 262 (D.C. Cir. 2001) and *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 40 (D.D.C., 2002), the exhaustion issue went through a round of appellate litigation related solely to PLRA issues in *Jackson*. Once the case was dismissed for lack of exhaustion, the plaintiffs exhausted and the case was re-filed. The plaintiffs then prevailed on the merits.

Finally, from an organizational perspective, the attorneys' fees provision of the PLRA does nothing but siphon resources from our other projects[9] to uphold our commitment to prisoners' rights. The WLC is fortunate as an organization to have highly successful projects not affected by the PLRA provisions and to have a local private bar that is overwhelmingly committed to pro bono work. Not all civil rights attorneys are so fortunate. By definition, to even be eligible to collect attorney fees, any attorney must have proven in a court of law that his or her client's case was meritorious. When the fees are as limited as they are under the PLRA, the only way we can support our Prisoners' Project, is to redirect fees received in other successful civil rights litigation. This does not alleviate the burden of the federal courts, but it limits our overall ability to serve all of our civil rights clients.

9 The Washington Lawyers' Committee is comprised of the Equal Employment Opportunity Project, the Immigrant and Refugee Rights Project, the Public Education Project, the Disability Rights Projects, and the Fair Housing Project, in addition to the D.C. Prisoners Project.

The PLRA Must Be Amended

We acknowledge that fixing the above problems must be balanced with the concern for the core purpose of the PLRA, namely preventing a flood of frivolous inmate litigation to clog the federal courts. The Prison Abuses Remedy Act of 2007 strikes the right balance by incorporating lessons of the last decade into the core provisions of the PLRA.

CORRECTIONS CORPORATION OF AMERICA	Inmate/Resident Grievance Procedures		
	14	14-5	Page 1 of 12
	MARCH 14, 2007	DECEMBER 1, 2002	
SIGNATURE ON FILE AT FACILITY SUPPORT CENTER Richard P. Seiter Executive Vice President/Chief Corrections Officer	CORRECTIONAL TREATMENT FACILITY		
SIGNATURE ON FILE AT FACILITY SUPPORT CENTER G.A. Puryear, IV Executive Vice President/General Counsel	TBA (FSC Approved on 4/12/07)	APRIL 26, 2005	

14-5.1 POLICY:

CCA will provide a means for all inmates/residents to address complaints regarding facility conditions, treatment, and policies and procedures. Many matters can and should be resolved directly and promptly between the inmate/resident and institutional staff.

All inmates/residents will have access to an informal resolution process to resolve their complaints. At any time the informal resolution process has not provided successful resolution of the complaint or in the event of an emergency grievance, inmates/residents may use the formal grievance process. All complaints should be assessed in a fair and impartial manner. Resolution in the best interest of the inmate/resident and the facility should be the primary goal.

14-5.2 AUTHORITY:

CCA Company Policy

14-5.3 DEFINITION:

Emergency Grievance – A grievance in which the potential for personal injury or irreparable harm exists.

Grievance Officer – Facility staff member responsible for tracking and management of the grievance process. This includes coordination of investigations and ensuring that resolution is reached.

Grievance – A written complaint concerning the facility conditions, treatment, policies, and/or procedures which is believed to personally affect the inmate/resident in a negative manner.

Inmate/Resident – Any adult or juvenile, male or female, housed in a CCA facility. Inmates/residents may also be referred to as detainees, prisoners, or offenders depending on classification and in accordance with facility management contracts.

Reasonable Suspicion – A suspicion which is based upon documentable, articulable facts which, together with the employee's knowledge and experience, lead him/her to believe that an unauthorized situation or violation of rules exists.

Reprisal – Any action or threat of action against any inmate/resident for the good faith use of or good faith participation in the informal resolution process or grievance procedure.

14-5.4 PROCEDURES:

PROCEDURES INDEX

SECTION	SUBJECT
A	Availability of Information
B	Training
C	Grievance Availability
D	Confidentiality

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E	Protection from Reprisal
F	Grievable Matters
G	Non-Grievable Matters
H	Excessive Filing of Grievances
I	Grievance Extensions
J	Grievance Officer
K	Informal Resolutions
L	Emergency Grievances
M	Formal Grievances
N	Grievances Against Contracting Agency
O	Remedies
P	Appeal Process
Q	Transfers/Releases
R	Records
S	Reporting
T	ATF Section

A. AVAILABILITY OF INFORMATION

1. Employees

A copy of this policy will be available to all employees.

2. Inmates/Residents

a. New inmates/residents will be informed of the informal resolution process and grievance procedures upon arrival.

b. A summary of procedures outlined in this policy will be included in the Inmate/Resident Handbook.

c. A copy of this policy will be available in the inmate/resident library. A copy will also be available for inmates/residents that do not have the opportunity to visit the library (i.e. segregated inmates/residents).

NOTE: In the event an inmate/resident has difficulty in understanding the procedures outlined in this policy, employees must ensure that the information is effectively communicated on an individual basis. Auxiliary aids which are reasonable, effective, and appropriate to the needs of the inmate/resident shall be provided when simple written or oral communication is not effective.

B. TRAINING

All employees will receive training on this policy in pre-service and in-service training. Training will be documented in accordance with CCA Policy 4-2, Maintenance of Training Records.

C. GRIEVANCE AVAILABILITY

1. Inmates/residents can invoke the grievance procedure regardless of disciplinary, classification, or other administrative decisions to which the inmate/resident may be subject.

2. An inmate/resident may not submit a grievance on behalf of another inmate/resident; however, assistance from a staff member or inmate/resident may be provided when necessary to communicate the problem on the grievance form.

D. CONFIDENTIALITY

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Grievances are considered special correspondence. If a sealed envelope is labeled "Grievance" and addressed to the Grievance Officer, it will not be opened for inspection unless there is reasonable suspicion that the sealed envelope contains contraband. If reasonable suspicion exists and the Warden/Administrator or designee's approval has been obtained, the envelope may be opened and inspected for contraband only.

E. PROTECTION FROM REPRISAL

Inmates/residents shall not be subject to retaliation, reprisal, harassment, or discipline for use or participation in the informal resolution process or grievance process. Any allegations of this nature will be thoroughly investigated by the Warden/Administrator and reviewed by the appropriate Divisional Managing Director, Facility Operations. The Divisional Managing Director, Facility Operations will notify the appropriate Vice President, Facility Operations of any allegations that are found to be credible.

F. GRIEVABLE MATTERS

Inmates/residents may grieve the following matters through the grievance process:

1. Violation of state and federal laws, regulations, or court decisions, to include but not limited to violations of the Americans with Disabilities Act, constitutional rights, etc.
2. Application of rules, policies, and/or procedures towards inmates/residents over which CCA has control;
3. Individual staff and inmate/resident actions, including any denial of access to the informal resolution or grievance processes;
4. Reprisals against inmates/residents for utilizing the informal resolution or grievance processes; and
5. Any other matter relating to the conditions of care and supervision within the authority of CCA.

AT THIS FACILITY, ADDITIONAL CONTRACTUAL INFORMATION REGARDING GRIEVABLE MATTERS IS:

NONE

G. NON-GRIEVABLE MATTERS

The following matters are not grievable by inmates/residents through these grievance procedures:

1. State and Federal court decisions;
2. State and Federal laws and regulations;
3. Final decisions on grievances;
4. Contracting agency (BOP, ICE, state department of corrections, etc.) policies, procedures, decisions, or matters (i.e., institutional transfers, parole and probation decisions, etc.);

 NOTE: Contracting agency policies, procedures, decisions, or matters shall be grieved in accordance with the regulations of the applicable contracting agency.
5. Disciplinary actions (all disciplinary action must be addressed in accordance with disciplinary procedures in place at the facility);

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6. Property issues (all property issues must be addressed in accordance with property procedures in place at the facility); and

7. Classification status (all classification status must be addressed in accordance with classification procedures in place at the facility).

AT THIS FACILITY, ADDITIONAL CONTRACTUAL INFORMATION REGARDING NON-GRIEVABLE MATTERS IS:

NONE

H. EXCESSIVE FILING OF GRIEVANCES

If it is determined by the Warden/Administrator that an inmate/resident is deliberately abusing the grievance system through excessive filing of grievances and/or repeated refusal to follow procedures, the Warden/Administrator may suspend the filing of additional grievances until all pending grievances have been resolved. The Warden/Administrator will provide the inmate/resident with written documentation of the suspension.

AT THIS FACILITY, ADDITIONAL CONTRACTUAL PROCEDURES REGARDING EXCESSIVE FILING OF GRIEVANCES ARE:

NONE

I. GRIEVANCE EXTENSIONS

In certain instances it may be necessary to extend response deadlines to allow for a more complete investigation of the claim(s). Justification for the extension must be provided to the inmate/resident on the 14-5C Grievance Extension Notice. The time extension will be determined by the Warden/Administrator and will not exceed fifteen (15) calendar days.

J. GRIEVANCE OFFICER

The Warden/Administrator will designate an individual(s) as Grievance Officer(s) who will coordinate the grievance process to include:

1. Reviewing all formal grievances received to ensure all necessary information is included;

 NOTE: Grievances that are prematurely appealed to the Warden/Administrator or designee will be returned without review.

2. Ensuring informal resolution has been attempted (excluding emergency grievances);

3. Assigning a number to all formal grievances;

4. Logging all grievances received;

5. Forwarding formal grievances to the appropriate department head for response;

6. Coordinating the timely investigation and response of formal grievances;

7. Ensuring that, when a grievance decision specifies that an action is to be taken, a date is included for completing the action;

8. Ensuring the inmate/resident receives a copy of the completed grievance and ensuring that the inmate/resident's signature is acquired at the time a response is provided;

9. Ensuring all remedies/required actions are fulfilled by the imposed deadline; and

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10. Maintaining all grievance records and documents as outlined in 14-5.4,R.

AT THIS FACILITY, THE POSITION DESIGNATED AS THE GRIEVANCE OFFICER IS:

GRIEVANCE COORDINATOR

K. INFORMAL RESOLUTIONS

With the exception of emergency grievances, inmates/residents are required to utilize the informal resolution process concerning questions, disputes, or complaints prior to the submission of a formal grievance. If an inmate/resident is not satisfied with the results of the informal resolution process, the inmate/resident may file a formal grievance.

1. Filing

 a. The 14-5A Informal Resolution form must be utilized to initiate the informal resolution process.

 b. All 14-5A's related to medical care and treatment must be submitted to qualified health services staff through facility mail.

 c. With the exception of grievances related to medical care and treatment, inmates/residents are required to submit 14-5A's through facility mail, or in person, to the appropriate unit staff. In the absence of unit management, the Warden/Administrator will designate a staff member to receive informal resolution forms.

 AT THIS FACILITY INFORMAL RESOLUTION FORMS WILL BE SUBMITTED TO:

THE GRIEVANCE COORDINATOR

 NOTE: Only qualified health services staff are authorized to provide responses to any questions, disputes, or complaints regarding medical care and treatment.

2. Resolution

 The staff member assigned to complete the informal resolution process will be responsible for:

 a. Conducting an initial meeting with the inmate/resident to discuss the issue;

 b. Meeting with all staff members involved with the issue;

 c. Researching necessary information to determine if a remedy is possible;

 d. Developing a response to present to the inmate/resident in an attempt to resolve the issue informally;

 e. Ensuring the inmate/resident receives a copy of the completed 14-5A at the time the response is provided; and

 f. Ensuring any remedies agreed upon are completed.

3. Time Guidelines

 The total time for the informal resolution process will be no more than fifteen (15) calendar days from the date the 14-5A was submitted through the date the response was presented to the inmate/resident, unless unusual circumstances are present. In

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the event unusual circumstances (e.g. inability to contact a critical staff member for the investigation process, facility on lock down status, etc.) prohibit the ability to meet time guidelines, the assigned staff member will provide the inmate/resident with written documentation extending the response deadline.

a. The inmate/resident must submit the 14-5A within seven (7) calendar days of the alleged incident.

b. The time for filing begins from the date the problem or incident became known to the inmate/resident.

c. In the event the inmate/resident is not satisfied with the response, the inmate/resident will have five (5) calendar days to submit a formal grievance to the Grievance Officer. In the event the inmate/resident pursues a formal grievance, the inmate/resident will be required to attach a copy of the 14-5A to the formal grievance form.

4. Documentation

The original 14-5A will be maintained by the facility with a copy presented to the inmate/resident at the time the response was presented.

AT THIS FACILITY, ORIGINAL 14-5A FORMS WILL BE MAINTAINED IN THE FOLLOWING LOCATION(S):

GRIEVANCE OFFICE

L. EMERGENCY GRIEVANCES

If the subject matter of the grievance is such that compliance with the regular time guidelines would subject the inmate/resident to risk of personal injury, the inmate/resident may request that the grievance be considered an emergency grievance. The emergency grievance must detail the basis for requiring an immediate response. When the grievance is of an emergency nature, utilization of the informal resolution process is not required.

1. Filing

a. The 14-5B Inmate/Resident Grievance form must be utilized to file an emergency grievance. The inmate/resident will complete Page 1 of the 14-5B and place it in a sealed envelope marked "Emergency Grievance". Sealed envelopes may be placed in the grievance mail box. If a grievance mail box is not used, the emergency grievance will be forwarded to the Grievance Officer.

AT THIS FACILITY, THE PROCEDURE FOR FORWARDING THE GRIEVANCE TO THE GRIEVANCE OFFICER IS:

GRIEVANCES WILL BE PLACED IN THE GRIEVANCE BOX LOCATED ON EACH HOUSING UNIT

b. The Grievance Officer will check the grievance mail boxes daily, excluding weekends and holidays. If a grievance mailbox is not used, grievances are to be forwarded daily, excluding weekends and holidays, to the Grievance Officer in accordance with the procedures listed above.

c. In the event it is necessary to file the emergency grievance on weekends or holidays, the sealed envelope will be given to the Shift Supervisor. The Shift

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Supervisor will ensure the Administrative Duty Officer is notified upon receipt of the emergency grievance.

2. Resolution

a. Emergency grievances received through the grievance mail box or alternative means, as identified above, will be reviewed by the Grievance Officer to determine if the grievance is of an emergency nature. If the grievance is determined to be of an emergency nature, the Grievance Officer will assign a number to the emergency grievance, document the grievance on the 14-5D Facility Grievance Log or via the current approved FSC/CCA electronic database, and immediately forward to an individual authorized to serve as Administrative Duty Officer below the rank of Warden/Administrator for a response.

b. Emergency grievances received on weekends and holidays will be reviewed by an individual authorized to serve as Administrative Duty Officer below the rank of Warden/Administrator to determine if the grievance is of an emergency nature and will respond accordingly.

c. The response must be documented on Page 2 of the 14-5B and submitted to the inmate/resident for signature at the time of presenting the response in person. The inmate/resident will receive a complete copy of the emergency grievance and any corresponding attachments at the time of presenting the response.

3. Time Guidelines

An individual authorized to serve as Administrative Duty Officer (below the rank of Warden/Administrator) shall take action to resolve the grievance within one (1) calendar day of receipt of the grievance and provide a written response to the inmate/resident.

4. Documentation

The individual authorized to respond to the emergency grievance will ensure that the Grievance Officer receives a copy of the emergency grievance and corresponding attachments to ensure that the emergency grievance is appropriately logged and filed.

M. FORMAL GRIEVANCES

1. Filing

a. The inmate/resident must file the grievance within five (5) calendar days of the response date listed on the 14-5A Informal Resolution form.

b. The 14-5B Inmate/Resident Grievance form must be utilized to file a formal grievance. The inmate/resident will complete Page 1 of the 14-5B and place it in a sealed envelope marked "Grievance". Sealed envelopes may be placed in the grievance mail box. If a grievance mail box is not used, the formal grievance will be forwarded to the Grievance Officer.

AT THIS FACILITY, THE PROCEDURE FOR FORWARDING THE GRIEVANCE TO THE GRIEVANCE OFFICER IS:

GRIEVANCES WILL BE PLACED IN THE GRIEVANCE BOX LOCATED ON EACH HOUSING UNIT

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c. The Grievance Officer will check the grievance mail boxes daily, excluding weekends and holidays. If a grievance mailbox is not used, grievances are to be forwarded daily, excluding weekends and holidays, to the Grievance Officer in accordance with the procedures listed above.

2. Resolution

a. Formal grievances received through the grievance mail box or alternative means as identified above will be reviewed by the Grievance Officer to ensure the formal grievance is correctly submitted and required documentation attached.

b. The Grievance Officer will assign a number to the formal grievance, document the grievance on the 14-5D Facility Grievance Log or via the current approved FSC/CCA electronic database and forward the formal grievance to the appropriate staff member for a response.

c. Formal grievance resolution should be determined by the appropriate department head in relation to the formal grievance unless the grievance pertain to the department head, in which case a different department head will be designated. For example, grievances related to medical care and treatment would be forwarded to the Health Services Administrator, grievances related to education would be forwarded to the principal, grievances related to classification would be forwarded to unit staff, etc.

d. Each formal grievance will be responded to by including a written explanation for approval/disapproval. The response must be documented on Page 2 of the 14-5B and given to the inmate/resident, in person, for signature. Responses may be given to the inmate/resident, in person, by the responder or the Grievance Officer. The inmate/resident will receive a complete copy of the formal grievance and any corresponding attachments at the time of presenting the response.

3. Time Guidelines

a. Unless a time extension has been granted, the inmate/resident will receive a response to the formal grievance within fifteen (15) calendar days of submission.

b. The total time for the formal grievance process will be no more than fifty (50) days from filing to a final appeal decision, unless unusual circumstances are present.

4. Documentation

The designated department head responding to the formal grievance will ensure that the Grievance Officer receives a copy of the formal grievance response and corresponding attachments to ensure that the formal grievance is appropriately logged and filed.

5. **AT THIS FACILITY, ADDITIONAL CONTRACTUAL PROCEDURES ARE:**

NONE

N. GRIEVANCES AGAINST CONTRACTING AGENCY

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AT THIS FACILITY, PROCEDURES FOR FILING A GRIEVANCE AGAINST THE CONTRACTING AGENCY ARE AS FOLLOWS:

ALL GRIEVANCES AGAINST THE CONTRACTING AGENCY WILL BE FORWARDED TO THE CONTRACT MONITOR OR THE CONTRACTING AGENCY.

O. REMEDIES

The informal resolution process and formal grievance process shall afford the inmate/resident the opportunity for meaningful remedy. Remedies shall cover a broad range of reasonable and effective resolutions. Remedies may include the following:

1. Change of procedures or practices appropriately related to the complaint or conditions;
2. Correction of records; or
3. Other remedies, as appropriate.

P. APPEAL PROCESS

1. Filing

If an inmate/resident is not satisfied with the decision of a formal or emergency grievance, the inmate/resident may complete the appeal section of the 14-5B and resubmit the grievance. Inmates/residents are entitled to appeal all adverse decisions, even those made on a purely procedural basis including but not limited to the expiration of a time limit. The inmate/resident must file the appeal within five (5) calendar days of the response date listed on the 14-5B Inmate/Resident Grievance form.

2. Resolution

a. The Grievance Officer will forward all grievance appeals to the Warden/Administrator for review and a final response.

b. Each appeal will be responded to by including a written explanation for approval/disapproval. The response must be documented on Page 2 of the 14-5B and given to the inmate/resident, in person, for signature. Responses may be given to the inmate/resident, in person, by the Warden/Administrator or the Grievance Officer. The inmate/resident will receive a complete copy of the appeal response and any corresponding attachments at the time of presenting the response.

c. The Warden/Administrator's decision is final unless otherwise specified in the facility management contract.

3. Time Guidelines

Barring extraordinary circumstances, a grievance will be considered settled if the decision at any step is not appealed by the inmate/resident within the given time limit.

a. Emergency Grievances

The inmate/resident will receive a response to the appeal within seven (7) calendar days of submission.

b. Formal Grievances

The inmate/resident will receive a response to the appeal within fifteen (15) calendar days of submission.

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4. Documentation

 If the response is presented to the inmate/resident by the Warden/Administrator, the Warden/Administrator will ensure that the Grievance Officer receives a copy of the appeal response and corresponding attachments to ensure the appeal is appropriately logged and maintained on file.

5. **AT THIS FACILITY, ADDITIONAL CONTRACTUAL APPEAL PROCEDURES ARE AS FOLLOWS:**

 IF THE INMATE IS NOT SATISFIED WITH THE WARDEN'S RESPONSE, THE INMATE MAY APPEAL TO THE CONTRACT MONITOR WITHIN FIVE (5) DAYS OF RECEIPT OF THE WARDEN'S DECISION.

 IF THE INMATE IS NOT SATISFIED WITH THE CONTRACT MONITOR'S REAPONSE, THE INMATE MAY APPEAL TO THE DIRECTOR OF THE DC DEPARTMENT OF CORRECTIONS WITHIN FIVE (5) DAYS OF RECEIPT OF THE CONTRACT MONITOR'S DECISION.

 ALL APPEALS MUST HAVE THE ORIGINAL GRIEVANCE AND RESPONSE ATTACHED WHEN FILED.

Q. TRANSFERS/RELEASES

If a grievance is submitted for review and the inmate/resident is transferred or released from custody, efforts to resolve the grievance will normally continue. It is the inmate/resident's responsibility to notify the Grievance Officer of the pending transfer or release and to provide a forwarding address and any other pertinent information.

R. RECORDS

1. All grievances will be systematically maintained by the Grievance Officer. All grievances (formal and emergency) and corresponding attachments will indicate the assigned grievance number and be date stamped upon receipt.

2. The Grievance Officer will maintain a log of all grievances received utilizing the 14-5D Facility Grievance Log or via the current approved FSC/CCA electronic database. The log shall include the following information:

 a. Grievance number;

 b. Date received;

 c. Inmate/resident name;

 d. Inmate/resident number;

 e. Informal attempt;

 f. Grievance category;

 g. Disposition date;

 h. Disposition code;

 i. Date appeal received, if applicable;

 j Appeal disposition date; if applicable; and

 k. Appeal disposition code, if applicable.

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3. All grievance documentation will be maintained in accordance with CCA Policy 1-15, Retention of Records.

4. Copies of grievances shall not be placed in an inmate/resident's file, unless it is a contractual requirement to do so.

AT THIS FACILITY, CONTRACTUAL REQUIREMENTS REGARDING LOCATION OF GRIEVANCE COPIES ARE:

A COPY OF THE GRIEVANCE LOG WILL BE FORWARDED TO THE CONTRACT MONITOR BY THE 5TH OF EACH MONTH.

5. Records regarding the participation of an individual in the informal resolution process or grievance procedure will not be available to other inmates/residents.

6. With the exception of employees involved in the grievance process or clerical processing, records regarding the participation of an individual in the informal resolution process or grievance procedures will not be available for review.

7. Employees participating in the disposition of an informal resolution process or grievance procedure shall have access to the essential records necessary to respond appropriately.

S. REPORTING

The 14-5E Grievance Report will be completed by the fifteenth day of each month and forwarded to the FSC Quality Assurance Department, unless a current approved FSC/CCA electronic database has been established.

T. **AT THIS FACILITY, ADDITIONAL CONTRACTUAL PROCEDURES ARE:**

NONE

14-5.5 REVIEW:

This policy will be reviewed by the Chief Corrections Officer or designee on an annual basis.

14-5.6 APPLICABILITY:

All CCA Facilities (Provided contractual requirements do not mandate otherwise)

14-5.7 APPENDICES:

None

14-5.8 ATTACHMENTS:

14-5A Informal Resolution

14-5B Inmate/Resident Grievance

14-5C Grievance Extension Notice

14-5D Facility Grievance Log

14-5E Quarterly Grievance Report

AT THIS FACILITY, ADDITIONAL FORM REQUIREMENTS ARE:

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NONE

14-5.9 REFERENCES:

CCA Policy 1-15

CCA Policy 4-2

CCA Policy 15-1

CCA Policy 15-2

CCA Policy 14-6

CCA Policy 18-1

ACA Standards:

4-4284/4-ALDF-3E-11/3-JTS-3D-09

4-4394

4-4446/4-ALDF-5B-18

4-4492/4-ALDF-5B-09/3-JTS-5H-04

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14-5A

INFORMAL RESOLUTION

Date:_____

Name (Print):_____
Last Name First Name Middle Initial

Number:_____ HOUSING ASSIGNMENT:_____

Description of issue, problem, and solution you suggest:

Attach additional pages, if necessary.

Date received from inmate/resident:_____

Name of staff member completing informal resolution process:_____

Date response due to inmate/resident:_____

Date and time initial meeting held with the inmate/resident:_____

Additional information received from initial meeting:

Names of staff members involved with the inmate/resident's issue:

Distribution:
Original: Facility
Copy: Inmate/Resident

09/07

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14-5A

Dates and times of contact with staff members concerning the inmate/resident's issue:

Additional information received from meetings with staff members:

[redacted]

Tentative completion date if remedy suggested:_____

[redacted]

By signing below, the inmate/resident verifies agreement with the remedy suggested above. If the inmate/resident is not satisfied with the remedy suggested above, the inmate/resident is not required to sign below and may choose to file a formal grievance with the Facility Grievance Officer. In either case, the inmate/resident will receive a copy of this form on the day the final resolution process is completed.

Inmate Signature:_____ Date:_____

Designated Staff Signature:_____ Date:_____

*Witness Signature:_____ Date:_____

*In the event the inmate/resident refuses to sign this form, a witness signature must be obtained to verify that the inmate/resident was offered the opportunity for informal resolution.

Informal Resolution Outcome: ☐ **RESOLVED** ☐ **UNRESOLVED**

Distribution:
Original: Facility
Copy: Inmate/Resident

03/07

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Grievance No.: 14-5B

INMATE/RESIDENT GRIEVANCE

FULL NAME:			
NUMBER:		HOUSING ASSIGNMENT:	

INFORMAL RESOLUTION ATTACHED (Not required for an emergency grievance)? ☐ YES ☐ NO

GRIEVANCE CATEGORY (CIRCLE ONE):

1. Facility Staff	8. Dental Services	15. Housing
2. Access to Legal Materials	9. Mental Health Services	16. Laundry
3. Denied Access to Informal Resolution/Grievance	10. Trust Account	17. Recreation
4. Reprisal for Using Informal Resolution/Grievance	11. Commissary	18. Visitation
5. Safety/Security	12. Food Service	19. Programs-education, work, religious, etc.
6. Sanitation	13. Mail	20. Violations of federal or state regulations, laws, court decisions (i.e. ADA or Constitutional rights)
7. Medical Services	14. Intake	21. Other

STATE GRIEVANCE: (Include documentation, witnesses, date of incident, any other information pertaining to the grievance subject. Attach additional pages if necessary).

Requested Action: (Attach additional pages if necessary)

Inmate/Resident's Signature: _____ Date Submitted: _____

RESPONDING STAFF MEMBER'S REPORT: (Attach additional pages if necessary. All pages must include the grievance number.)

RESPONDING STAFF MEMBER'S DECISION: (Attach additional pages if necessary. All pages must include the grievance number.)

Responding Staff Member's Printed Name: _____ Title: _____

Responding Staff Member's Signature: _____ Date: _____

Inmate/Resident's Signature (upon receipt): _____ Date: _____

INMATE/RESIDENT APPEAL (Attach additional pages if necessary. All pages must include the grievance number.)

WARDEN/ADMINISTRATOR'S DECISION: (Attach additional pages if necessary. All pages must include the grievance number.)

Warden/Administrator's Signature: _____ Date: _____

Inmate/Resident's Signature (upon receipt) _____ Date: _____

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DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS

Program Statement

OPI:	**DIR**
Number:	**4030.1F**
Date:	**January 21, 2008**
Supersedes:	**4030.1E (7/1/04)**
Subject:	**Inmate Grievance Procedures (IGP)**

1. **PURPOSE AND SCOPE.** To update administrative procedures through which inmates of the District of Columbia Department of Corrections (DOC) may seek resolution of complaints.

2. **POLICY**

 a. It is DOC policy to provide an administrative means for expression and resolution of inmate issues and complaints through informal resolution. Many matters can and should be resolved directly and promptly between the inmate and authorized institutional staff and resolution shall be the primary goal.

 b. If informal resolution does not provide a successful solution for the complaint or in the event of an emergency grievance, inmates may use the formal grievance process.

 c. The grievance process has at least one level for appeal.

 d. All complaints and grievances shall be considered and resolved in a fair and impartial manner.

 e. Grievances are considered legal correspondence. Staff shall not open or inspect a sealed envelope that is labeled "Grievance" and addressed to the Grievance Coordinator or the Director.

 f. DOC employees, contractors, interns and volunteers shall not retaliate or allow another inmate to retaliate against an inmate for the good faith use of, or participation in, the inmate grievance process.

3. **APPLICABILITY**

 a. This Program Statement (PS) applies to any DOC facility and contractors who house or provide services to inmates under the care and custody of the DOC.

b. Inmates housed in contract prison facilities shall use the contractor's grievance process, noting the contractor to be responsible for day-to-day operations within the affected facility. Upon exhaustion of the contractor's grievance process, the inmate may send a written appeal to DOC officials as outlined in Section 20 of this directive.

c. *Grievance Issues.* Inmates may request informal resolution and/or grieve the following matters through the grievance process.

1) Matters relating to the conditions of safety, care and supervision;

2) Matters relating to inmate programs, activities and services;

3) Matters relating to inmate property;

4) Matters relating to individual staff treatment and inmate actions;

5) Matters relating to sentence computations, good time and jail credits, detainers, and late release;

6) Denial of access to the informal resolution or IGP processes;

7) Reprisals against inmates for utilizing the IGP process;

8) Matters pertaining to inmate treatment and legal rights established by federal and local law and regulations; and

9) The application of DOC rules, policies and/or procedures except those listed in §d ¶1 below (those matters have established appeal procedures).

d. *Non-Grievance Issues.* In accordance with this directive the following issues cannot be grieved under this process.

1) Institutional or Court Ordered Work Release decisions, decisions of the Adjustment or Housing Boards, Classification Committee decisions and requests under the Freedom of Information Act and HIPAA *can not be grieved under this procedures but can be appealed through the Warden in accordance with related policy;*

2) Inmate class action grievances or petitions;

3) Final decisions on grievances;

4) Inmate Accident Claims, Tort Claims;

5) Complaints filed on behalf of other inmates;

6) Federal and local court decisions, laws and regulations; and

7) Policies, procedures, decisions or matters to include but not be limited to transfers, sentence computations, parole/ probation/release/ treatment decisions issued by the Bureau of Prison, Immigration and Customs Enforcement (ICE) or other states and jurisdictions;

4. **NOTICE OF NON-DISCRIMINATION**

a. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code §2.1401.01 et seq., (Act) the District of Columbia does not discriminate on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

b. DOC prohibits discrimination against inmates based on race, religion, national origin, gender, sexual orientation or disability when making administrative decisions in providing access to programs. When both males and females are housed in the same facility available services and programs are comparable.

c. Inmates with disabilities, including temporary disabilities, are housed in a manner that provides for their safety and security. Housing used by inmates with disabilities, including temporary disabilities, is designed for their use and provides for integration with other inmates. Programs and service areas are accessible to inmates with disabilities who reside in the facility. Discrimination on the basis of disability is prohibited in the provision of services, programs and activities.

5. **PROGRAM OBJECTIVES.** The expected results of this program are:

a. Open lines of communication will identify, prevent or resolve matters and reduce the need for complaints and grievances.

b. Inmate grievances will be resolved through formal procedures when informal means have failed.

c. Written responses based upon full investigation and resolution when appropriate including the reasons for the decision shall be given to all inmate complaints and grievances within the prescribed time limits.

d. Inmates will use this procedure and pursue claims in court only if dissatisfied with resolutions obtained from the IGP.

6. **DIRECTIVES AFFECTED**

a. **Directive Rescinded**

D.O. 4030.1E Inmate Grievance Procedure (IGP) (7/1/04)

b. **Directives Referenced**

a. PS 4020.1 Inmate Orientation Program (Inmate Handbook)

7. **AUTHORITY**

a. DC Code §24-211.02 (b) (2) Jail Improvement Act of 2003

b. Prison Litigation Reform Act (PLRA), 42 USC § 1997e(a.)

8. **STANDARDS REFERENCED.** American Correctional Association (ACA) 4th Edition Standards for Adult Local Detention Facilities 4-ALDF-2A-05, 4-ALDF-2A-06, 4-ALDF-2A-27, 4-ALDF-6B-01 and 4-ALDF-6B-02.

9. **RESPONSIBILITIES**

a. Wardens shall ensure that an appropriate investigation is conducted and an adequate response is prepared for each grievance in accordance with the procedures set forth in this directive.

b. The Deputy Director shall ensure that an appropriate investigation is conducted and an adequate response is prepared for each appeal to a grievance in accordance with the procedures set forth in this directive.

c. Each facility shall maintain a sufficient supply of Inmate Request Slips and Inmate Complaint – Informal Resolution forms.

d. Each facility shall maintain a sufficient supply of IGP forms for formal resolution and submission of appeals.

e. Each Housing Unit and Community Correctional Center (CCC) supervisor shall ensure that sufficient forms are available and accessible on the unit during his or her tour of duty.

f. The IGP shall be available to inmates regardless of any disciplinary, classification, or other administrative or legal conditions affecting them.

10. **INMATE NOTIFICATION**

a. The Warden or the Office of Community Corrections (OCC) Administrator shall ensure that this PS and any other written directives pertaining to the Inmate Grievance Procedure (IGP) are readily available to all inmates/offenders.

b. The inmate grievance procedure is outlined in the Inmate Handbook and further notification shall also be given to each inmate during intake orientation.

c. This PS shall be readily available in the law library and case manager offices, posted on inmate bulletin boards and, as appropriate, shall be described in inmate handbooks.

d. The Warden shall ensure that non-English speaking inmates, inmates who cannot read or are otherwise impaired (physically or mentally), receive assistance in order to understand and access the IGP.

11. **STAFF NOTIFICATION/TRAINING**

a. The Deputy Director shall ensure that this PS and any other written directives pertaining to the IGP shall be made available to all staff assigned to DOC and DOC contract facilities.

b. The Department's Training Academy shall include a discussion of the IGP PS as part of its Pre-service, Basic Correctional Training (BCT) and In-service training curriculum for employees.

c. Staff members shall have an opportunity to ask questions regarding the IGP and will be given an opportunity to have these questions answered orally.

d. The Training Administrator shall maintain the signed acknowledgements on file.

12. **SUPERVISION AND MANAGEMENT**

a. The Warden, Deputy Wardens and designated program managers shall visit housing units and inmate activity areas at least weekly to encourage informal contact with staff and inmates and to informally observe living and working conditions.

b. Chief Case Managers, Case Managers, Correctional Supervisors and Housing Unit Officers shall make every attempt to keep the channels of

communication open between staff and inmates and shall informally resolve issues expeditiously whenever possible.

c. When managers determine that the results of an inmate grievance point to systemic deficiencies, appropriate improvements shall be taken. Improvements may include recommendations for procedural changes to correct systemic problems, refresher training, counseling or discipline when the investigation findings clearly point to this as the appropriate action.

13. **INVESTIGATING GRIEVANCES**. Managers shall investigate and respond to grievances. Persons implicated or involved in a grievance are prohibited from investigating that grievance.

14. **CONFIDENTIALITY.** Records concerning an individual's participation in the IGP are considered confidential. These records shall be made available in accordance with the established procedures for confidential records and information, as contained in the D. C. Freedom of Information Act.

15. **INMATE GRIEVANCE ADVISORY COMMITTEE (IGAC).** The CDF shall establish and maintain an IGAC, composed of five (5) inmates, the IGP Coordinator, one program manager and one uniform supervisor. The IGAC shall meet monthly and has the following responsibilities:

 a. Discussing general inmate concerns and grievance matters as defined in this directive;

 b. Providing recommendations and comments to the Warden/Office of Community Corrections (OCC) Administrator regarding the operation, effectiveness, and credibility of the IGP process;

 c. Providing recommendations to the Deputy Director and the OCC Administrator for improved activities and conditions;

 d. Reviewing the IGP Program Statement during annual reviews; and

 e. Preparing and forwarding minutes of IGAC meetings to the Warden for review and any appropriate action.

16. **INMATE GRIEVANCE PROCEDURE (IGP) COORDINATOR**

 a. The Warden shall appoint an IGP Coordinator who shall:

 1) Coordinate activities and operations associated with informal complaint resolution and IGP retrieval, distribution, tracking,

database entry, monitoring and establishment of resolution suspense dates.

2) The CDF IGP Coordinator or designee shall collect informal complaints and grievances from each housing unit 'IGP" mailbox on a daily basis (excluding Saturdays, Sundays and legal holidays).

3) Ensure informal resolution has been attempted (excluding emergency grievances).

4) Assign and forward informal and formal grievances to the appropriate program manager for response/resolution.

5) Maintain the JACCS electronic data input and tracking.

6) Apprise the affected Warden on the next business day when suspense dates are not met.

7) Ensure the inmate receives a copy of the completed informal response or grievance.

8) If the inmate is transferred to another facility under the jurisdiction of or contract with DOC, the IGP Coordinator shall forward the *CDF response* to the IGP Coordinator at the affected facility.

9) The IGP Coordinator where the inmate is located shall ensure that the response is forwarded to the inmate and a copy placed in the inmate's official institutional record.

10) Not less than quarterly, conduct a random sample of grievance decisions and document if the assigned manager took actions specified by the imposed deadline.

11) Bring matters of concern or potential problems to the Warden's and/or other appropriate manager's attention.

b. The Director and Deputy Director shall assign staff to perform the above stated duties at the respective appeal levels.

17. **INMATE REQUEST SYSTEM**

a. *Request Slip.* Inmates shall continue to use the DOC Inmate Request Slip system when seeking routine assistance.

b. *Sick Call.* Inmates shall request medical treatment by signing up for sick call. Inmates shall request urgent medical assistance via the housing unit staff.

c. *Environmental Safety and Sanitation Inspections.* During cell inspections on the #2 Shift and #3 Shift inmates shall demonstrate that cell plumbing works and shall report broken fixtures and repair. Inmates shall inform correctional staff at any time when more urgent breakdowns such as clogged plumbing occur.

18. **INFORMAL COMPLAINT PROCESS**

a. With the exception of emergency grievances, inmates/residents are required to utilize the informal resolution process concerning disputes, or complaints that were not reasonably addressed after submission of a request slip.

b. Informal Complaint Submission

1) Inmates shall, within seven (7) calendar days of the incident/reason for complaint or within seven (7) days of knowledge of the incident/reason for complaint became known to the inmate, file the informal resolution request (Attachment A).

2) Inmates may request the Inmate Complaint – Informal Resolution forms from any staff member who is assigned to his or her housing unit and the affected staff member shall give the inmate the form during his or her shift or tour of duty.

3) The inmate shall place the complaint in the grievance box that is located in the housing unit.

4) The IGP Coordinator or designee shall collect inmate complaints from each CDF housing unit locked grievance box daily, Monday through Friday.

5) The IGP Coordinator shall generate the inmate receipt using the Crystal Reports *Informal Resolution Request Receipt.*

6) The IGP Coordinator shall forward the inmate receipt via the institutional mail.

7) The IGP Coordinator shall assign the complaint to the appropriate program manager and establish a response date.

8) The IGP Coordinator shall log the complaint and make appropriate entries into an informal complaint tracking system.

9) Informal resolution should be achieved within ten (10) calendar days of the inmate's submission to the IGP Coordinator.

c. Informal Resolution Meeting. The staff member assigned to complete the informal resolution process shall:

1) Conduct an initial meeting with the inmate to discuss the issue;

2) Meet with all staff members involved with the issue when needed;

3) Research necessary information to determine if a remedy is possible;

4) Develop a response to present to the inmate in an attempt to resolve the issue informally;

5) Ensure the inmate and the IGP Coordinator receive a copy of the completed informal grievance form at the time the response is provided;

6) Obtain the inmate's signature upon resolution of the complaint; and

7) Ensure any remedies agreed upon are completed.

19. **INMATE GRIEVANCE PROCESS**

a. An inmate may file a formal grievance when:

1) The inmate is not satisfied with the results of the informal resolution process. The inmate shall file the IGP within five (5) calendar days of receipt of the informal resolution response, or

2) The inmate has not received a response within ten (10) calendar days of filing the complaint.

b. Each grievance must pertain to one specific incident, charge or complaint.

c. Inmates/offenders shall not submit duplicate copies of the same grievance.

d. Inmates may request IGP Form 1 *Grievance* (Attachment B) from any staff member who is assigned to his or her housing unit and the affected staff member shall ensure that inmates who request an IGP Form are provided a form during his or her shift or tour of duty.

e. Inmates may also obtain grievance and appeal forms during visits to the law library.

f. If an IGP Form 1 *Grievance* cannot be obtained, an inmate may submit his or her grievance on standard, letter-sized paper. This grievance should contain the following information:
 1) The name and DOC number of inmate filing the grievance;
 2) The name of the institution or community correctional center where the inmate is housed;
 3) The nature of the complaint or grievance, date of occurrence, and the remedy sought;
 4) The inmate's signature; and
 5) Date.

20. **PROCEDURES FOR FILING AN INMATE GRIEVANCE - CDF**

a. The inmate shall place the IGP Form 1 *Grievance* in the locked box marked "GRIEVANCES." IGP collection boxes are located in each housing unit.

b. Inmates housed in segregation units shall deposit the IGP form in the locked box marked "GRIEVANCES" during their individual recreation time or may also submit the IGP to their assigned case manager or a supervisor, having first placed the IGP form in a sealed envelope. The case manager or supervisor shall then place the IGP form in the locked box marked "GRIEVANCES".

21. **PROCEDURES FOR FILING AN EMERGENCY GRIEVANCE**

a. Emergency grievances shall be defined as matters in which an inmate would be subjected to substantial risk of personal injury, or serious and irreparable harm, if the inmate filed the grievance in the routine manner with the normally allowed response time.

b. The inmate must prominently label and identify the grievance as an "Emergency Grievance" at the top of the IGP Form 1 *Grievance* and state the nature of the emergency.

c. The inmate shall file the emergency grievance in a sealed envelope; also marking it as an emergency grievance. The inmate shall address his or her Emergency Grievance to the lowest administrative level at which an appropriate remedy can be achieved (i.e., OCC Administrator, Warden, or Director).

d. If an inmate's/offender's grievance is of a sensitive nature and he/she has reason to believe that he/she would be adversely affected if it was to become known at the institutional level, he/she may file the grievance directly with the Director. All such Emergency Grievances may be placed in the IGP box or forwarded via the regular institutional mail.

e. The IGP Coordinator shall immediately review and consult with the Warden, or Administration/OCC Administrator to determine if the complaint is of an emergency nature as defined in this directive.

f. The inmate shall be informed if the grievance is not accepted as an emergency grievance and that the grievance shall be treated as a regular grievance.

g. The following special provisions shall apply to Emergency Grievances:

1) An emergency grievance shall be responded to within 72 hours of its receipt.

2) Within 48 hours of receiving a response to the emergency grievance, an inmate may appeal to the next level of the IGP appeal process.

22. **EXCESSIVE FILING OF GRIEVANCES.** If it is documented by the Warden/Administrator that an inmate is deliberately abusing the grievance system through excessive filing of grievances and/or repeated refusal to follow procedures, the Warden/Administrator may suspend the filing of additional grievances until all pending grievances have been resolved. The Warden or Administrator will provide the inmate with written documentation of the suspension.

23. **FILING AN APPEAL**

a. Central Detention Facility

1) If an inmate housed at the CDF is not satisfied with the Warden's response to a grievance, he or she may file an appeal to the Deputy Director.

2) This appeal shall be filed within five (5) calendar days of receipt of the grievance response from the Warden, using IGP Form 2 Appeal – Deputy Director (Attachment C). The appeal shall be accompanied by a copy of the original grievance and the Warden's response and supporting documentation. If an IGP Form 2 *Appeal – Deputy Director* cannot be obtained, an inmate may submit the grievance on standard letter-size paper.

3) The Deputy Director shall respond to an appeal within twenty-one (21) calendar days following its receipt.

b. Corrections Corporation of America Correctional Treatment Facility

1) Inmates housed in the CTF shall exhaust all provided remedies in the affected facility to include formal and informal resolution efforts.

2) The CCA Warden shall ensure that sufficient grievance and appeal forms are available on the housing units at the CTF.

3) If the inmate is not satisfied with his or her response from the CTF Warden he or she may file an appeal to the Deputy Director within five (5) calendar days, using IGP Form 2 *Appeal – Deputy Director* (Attachment C) or plain letter-size paper. The inmate must attach copies of the informal complaint/resolution and IGP and response, and any supportive documentation, from the CCA/CTF Warden.

4) The Deputy Director or designee shall investigate and respond to the appeal within twenty-one (21) calendar days following its receipt.

5) The Deputy Director or designee shall input required data into JACCS *Appeal Log*.

c. Contract Community Correctional Center

1) If an inmate/offender housed in a contract community correctional center is not satisfied with his or her response from the contract CCC Administrator he or she may file an appeal to the Deputy Director within five (5) calendar days, using IGP Form 2 *Appeal – Deputy Director* (Attachment C). If an IGP Form 2 *Appeal – Deputy Director* cannot be obtained, an inmate may submit the grievance on standard letter-size paper. This appeal must be accompanied by copies of the original grievance and responses, and appropriate support documentation, from the OCC Administrator.

2) The Deputy Director or designee shall respond to the appeal within twenty-one (21) calendar days of receipt.

3) The Deputy Director or designee shall input required data into JACCS *Appeal Log*.

d. Final Appeal to the DOC Director

1) As a final appeal an inmate/offender housed in a correctional facility or CCC under jurisdiction of or contract with DOC who is dissatisfied with

an appeal decision rendered by the Deputy Director may submit his or her grievance to the Director within five (5) calendar days following the receipt of a grievance appeal response.

2) The IGP Form 3 (Attachment D) *Appeal – Director* shall be used for filing an appeal to the Director.

3) Appeals to the Director must be accompanied by the original grievance along with the corresponding responses. If an IGP Form 3 *Appeal – Director* cannot be obtained, an inmate may submit the grievance on standard letter-size paper.

4) The Director shall respond to an inmate's/offender's appeal within twenty-one (21) calendar days of receipt of the appeal.

5) The Director shall be the final level of appeal for each inmate/offender who files a Grievance within the DOC Inmate Grievance Procedure.

6) The Director's designee shall input required data into JACCS Appeal Log.

24. DOC PROCEDURES FOR PROCESSING A GRIEVANCE

a. IGP Coordinator

1) The IGP Coordinator or designee shall collect inmate grievances from each CDF housing unit grievance box daily, Monday through Friday.

2) The IGP Coordinator shall inform the inmate in writing:

a) When a non-emergency grievance will receive informal resolution because the inmate failed to follow this step of the process;

b) When the matter can not be grieved under the IGP and/or should be otherwise appropriately addressed.

3) The IGP Coordinator shall generate the inmate receipt using the Crystal Reports Informal Resolution Request Receipt or *GP Grievance Receipt*.

4) The IGP Coordinator shall forward the inmate receipt via the institutional mail.

5) The IGP Coordinator shall input required complaint data into the respective JACCS *Informal Resolution Request* or *Grievance* Data Entry Screen to include:

a) Grievance Entry Information - The IGP Coordinator shall enter the *JACCS Grievance Type Code* to indicate the subject of the complaint in order to permit efficient reporting, tracking and monitoring informal resolution and grievances, in all logs and reports.

b) Submitted for Review Information

c) Referred to Investigation

d) Extension of Time requested and new date for response if the inmate consents

e) Finding Response

f) Final Appeal Ruling (when applicable)

6) The IGP Coordinator shall scan the original complaint/grievance into PaperClip.

7) The IGP Coordinator shall then forward the complaint/grievance to the appropriate manager for investigation and resolution.

8) The IGP Coordinator will monitor response due dates using the Crystal Reports *IGP Grievances Due Next 7 Days* and *IGP Overdue Grievances in CDF*.

9) The IGP Coordinator will make notification to the appropriate managers identified in step 9.

b. Investigation. The manager shall impartially investigate the complaint and make every effort for reasonable resolution

c. Response to IGP

1) The manager shall provide a written memorandum of response to the IGP Coordinator within ten (10) calendar days following receipt of the grievance.

2) The affected Warden shall review and approve/disapprove or otherwise revise the response.

3) The IGP Coordinator shall forward written notice of findings and the decision to the inmate.

4) In any instance when the IGP Coordinator, in consultation with the affected Warden and the investigating manager, determines that a

sufficient response to a grievance cannot be rendered within the prescribed time limitation, the following conditions apply:

a) The affected inmate must be notified in writing of the need for the extension and of the specific length of the extension.

b) The inmate must agree in writing to the extension.

c) Otherwise, when a grievance does not receive a response within the prescribed response time, as established in this PS, the inmate may proceed to the next step in the grievance procedure.

25. **REPORTING**

a. The IGP Coordinator shall print the *Crystal Report IGP Complaint Log* that records all formal grievances entered in JACCS under the IGP. Not later than the 10th day of each month, a copy of this log, reflecting grievances filed during the previous month, shall be forwarded through the Deputy Director to the Director.

b. Each DOC official who renders a decision on an Inmate Grievance Appeal shall enter required data in JACCS IGP screen.

c. The IGP Coordinator shall print the *Crystal Report Unresolved Grievance Log* that tracks and monitors the progress of grievances remaining unresolved more than 22 days after receipt. Not later than the tenth 10th day of each month, the Warden shall forward a copy of this log along with a Plan of Action for completion through the Deputy Director to the Director.

d. All records, logs, and reports that pertain to inmate informal resolution and grievance shall be maintained in accordance with the DOC Records Retention and Disposal Schedule.

e. The Director shall provide to the Council on a quarterly basis internal reports relating to living conditions in the Central Detention Facility, including inmate grievances and a report *Unresolved Grievance Log*.

26. **IGP EVALUATION**

a. The IGP Coordinator shall submit monthly reports to the Warden that shall include but not be limited to IGP processing or procedural issues, emergent and systemic deficiencies and general complaints and concerns that warrant attention.

b. The Risk Manager shall review IGP reports and conduct quarterly audits and in conjunction with the Warden determine plans of action where warranted to improve safety and program performance.

c. At a minimum, the reviews described above, shall include assessments of the following operational factors:

1) Compliance with Response Time – An assessment to determine if inmate grievances are responded to within the prescribed time periods.

2) Availability of Forms – A determination of the accessibility and availability of the forms used to submit grievances.

3) Response to Grievances – An analysis to determine if appropriate responses and remedies are being provided in response to grievances.

4) Credibility of the System – An assessment of inmate knowledge of, satisfaction with and confidence in the IGP.

5) Conclusions and Recommendations – An evaluation of the data generated through the IGP process (i.e., number of grievances, types of grievances filed, number and types of grievances by institutions). This data shall be used to develop specific conclusions and recommendations regarding Department operations and the DOC IGP.

d. Annual Statistical Summary Report. The Office of Management Information and Technology Services shall maintain the database and provide an annual statistical summary of the DOC IGP and submit it to the Director and the Office of Internal Controls, Compliance and Accreditation. This summary shall be provided by the 21st day of October for the preceding fiscal year.

Devon Brown
Director

ATTACHMENTS

A. Informal Complaint – Informal Resolution
B. IGP Form 1 *Grievance* (Administrative Remedy to Warden/OCC Administrator)
C. IGP Form 2 (Appeal to Deputy Director)
D. IGP Form 3 (Appeal to Director)

DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS

Program Statement

OPI:	**DIRECTOR**
Number:	**3350.2E**
Date:	**February 21, 2007**
Supersedes:	**3350.2D (7/10/02)**
Subject:	**Elimination of Sexual Abuse, Assault and Misconduct**

1. **PURPOSE AND SCOPE.** This directive establishes uniform procedures for recognizing, preventing, reporting, investigating and adjudicating incidents of sexual abuse, sexual assault and sexual misconduct against inmates who are confined in DC Department of Corrections (DOC) owned, operated and contract facilities. This directive complies with District of Columbia "Title 22. Criminal Offenses and Penalties Chapter 30. Sexual Abuse" and incorporates guidelines from the Rape Elimination Act (PREA) of 2003, American Correctional Association (ACA) Standards and current DOC zero tolerance policy against sexual abuse of in-mates.

2. **POLICY**

 a.. DOC strictly prohibits the sexual assault of any persons who work, visit or who are confined in any of its facilities.

 b. DOC strictly prohibits sexual abuse of persons in the official custody of DOC and contract facilities. DC Code §22-3001 defines sexual abuse to include the commission of sexual acts and sexual contact.

 c. For the purposes of this directive, acts of sexual misconduct against inmates shall be included.

 d. DC law and DOC do not recognize a defense of consensual sexual contact between staff and inmates (i.e., persons who are in "official custody"). DOC shall continue to pursue strict administrative discipline and vigorous referral for criminal prosecution when staff engages in sexual assault/acts and sexual contact with inmates. Staff includes DOC employees, volunteers, contract personnel and any other persons who provide services in DOC facilities.

 e. DOC maintains policy of zero tolerance and prohibits retaliation against any individual because of his/her involvement in the reporting or investigation of a complaint. It is DOC policy to treat retaliation as a separate actionable offense that is subject to separate administrative sanctions and possible referral for criminal prosecution.

f. DOC strictly prohibits inmate-upon-inmate sexual assault, sexual abuse and inmate-to-inmate sexual acts and sexual contact to include that of a consensual nature. Inmate initiated sexual assault, sexual abuse shall be referred for criminal prosecution and DOC shall impose disciplinary sanctions when inmates engage in consensual sexual acts and/or sexual contact.

g. It is DOC policy to require that, all activities encompassed in reporting and investigating complaints are held in confidence and on an official need to know basis. Likewise, case records are confidential and may include but not be limited to verbal reports; written incident, investigation, disposition, medical, counseling and evaluation findings and recommendations for post-release treatment and/or counseling and witness statements. It is DOC policy to treat a breach(s) of confidentiality as a separately actionable offense that is subject to administrative sanctions.

3. **APPLICABILITY.** This policy applies to all DOC employees, contract employees, volunteers, as well as other individuals who provide services at a DOC facility and applies to inmates committed to DOC and its contract facilities.

4. **PROGRAM OBJECTIVES.** The expected results of this program are:

a. Upon arrival at each facility, inmates shall receive information about sexual assault, sexual abuse and sexual misconduct. Information shall address the prevention, intervention, self-protection, reporting, adjudication procedures and the accessibility of medical and mental health counseling for victims.

b. Staff will have a clear understanding that a sexual act or sexual contact between an inmate and an employee is sexual abuse even if the inmate consents and that sexual abuse is a felony offense pursuant to DC Code §22-3002 through §22-3006.

c. The occurrence of inmate-upon-inmate sexual assault, sexual abuse and sexual contact may be reduced by identifying and providing separate housing for predators and vulnerable inmates who may be potential victims.

d. Prompt investigation and appropriate discipline shall be taken against employees and inmates who sexually abuse/assault inmates or otherwise violate mandates set forth in this directive.

5. **DIRECTIVES AFFECTED**

a. **Directives Rescinded**

1)	PS 3350.2D	Sexual Misconduct Against Inmates (7/10/02)
2)	CN-1	3350.2D Sexual Misconduct Against Inmates (10/18/02)

b. **Directives Referenced**

1)	PS 4030.1E	Inmate Grievance Procedure (IGP)
2)	PS 4020.1C	Inmate Orientation Program
3)	PM 5300.1C	Inmate Disciplinary and Administrative Housing Procedures
4)	PS 6000.1C	Medical Management

6. **AUTHORITY**

a. 42 USCS § 15609 Title 42. The Public Health and Welfare Chapter 147. Rape Elimination

b. D.C. Code Title 22. Criminal Offenses and Penalties, Chapter 30 Sexual Abuse §22-3001, §22-3013, §22-3014, §22-3017 and §22-3018.

c. DC Code 24-442, Promulgation of Rules

7. **STANDARDS REFERENCED**

a. American Correctional Association (ACA), 2nd Edition, Standards for Administration of Correctional Agencies: 2-CO-3C-01.

b. American Correctional Association (ACA), 4th Edition, Performance-Based Standards for Adult Local Detention Facilities: 4-ALDF-2A-29, 4-ALDF-2A-30, 4-ALDF-2A-32, 4-ALDF-2A-34, 4-ALDF-4D-22, 4-ALDF-4D-22-1, 4-ALDF-4D-22-2, 4-ALDF-4D-22-3, 4-ALDF-4D-22-4, 4-ALDF-4D-22-5, 4-ALDF-4D-22-6, 4-ALDF-4D-22-7, 4-ALDF-4D-22-8, 4-ALDF-7B-8 and 4-ALDF-7B-10.

c. American Correctional Association (ACA), 4th Edition, Performance-Based Standards for Adult Community Residential Services: 4-ACRS-6A-05.

8. **NOTICE OF NON-DISCRIMINATION**

a. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code §2.1401.01 et seq., (Act) the District of Columbia does not discriminate on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

b. DOC prohibits discrimination against inmates based on an inmate's race, religion, national origin, gender, sexual orientation, disability or any other

type of prohibited discrimination when making administrative decisions and in providing access to programs.

9. **SEXUAL ABUSE - GENERAL PROVISIONS.** For the purposes of this directive, the following provisions shall apply.

 a. Official Custody – Pursuant to DC Code §22-3001, detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a chare or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion and during transport, medical diagnosis or treatment, court appearance, work and recreation, probation or parole.

 b. Sexual Assault – a forcible sexual act, a sexual act against the inmate's will, or a sexual act that is achieved through the exploitation of fear or the threat of physical violence or bodily injury; or

 c. Sexual Abuse – a sexual act that is not forced or against the person's will but where the inmate is incapable of giving consent because of his/her young age, temporary or permanent mental or physical incapacity or by reason of being in the official custody of DOC.

 d. Sexual Acts

 1) The penetration, however slight, of the anus or vulva or another by a penis;

 2) Contact between the mouth and penis, the mouth and the vulva or the mouth and the anus; or

 3) The penetration, however slight, of the anus or vulva by a hand or finger or by any object or instrument, with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person. This does not include situations when:

 a) Health care personnel are gathering physical evidence, or engaged in other legitimate medical treatment, in the course of investigating sexual assault, sexual abuse;

 b) The use of a health care provider's hands or fingers or the use of medical devices in the course of appropriate medical treatment unrelated to sexual assault, sexual abuse; or

 c) The use of a health care provider's hands or fingers or the use of instruments to perform body cavity searches in order to maintain security and safety within the facility provided that the search is conducted in a manner consistent with constitutional requirements.

e. Sexual Contact. The touching (or fondling), using any clothed or unclothed body part or object either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttock of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

f. Sexual Misconduct

1) Sexual Harassment

a) Verbal or physical sexual conduct that creates a hostile, offensive or intimidating environment, including, but not limited to, obscene or sexually offensive advances, gestures, and comments; or influencing or making promises involving an inmate's safety, custody, privacy, housing, privileges, work detail or program status in exchange for sexual favors.

b) Influencing or offering to favorably influence an inmate's safety, custody, privacy, housing, privileges, work detail, or program status if the inmate submits to sexual advances or sexual contact.

c) Influencing or threatening an inmate's safety, custody, privacy, housing, privileges, work detail, or program status because the inmate has refused to submit to a sexual advance.

2) Invasion of Privacy

a) Observing, attempting to observe, or interfering in an inmate's activities, which are of a personal nature, without a sound penological reason.

b) Failure of an employee of the opposite sex to announce his/her presence, without a sound penological reason, when entering an inmate's housing unit.

g. Retaliation - Restraint, interference, coercion, acts of covert or overt vengeance or threats of action to discourage, prevent or punish an inmate for refusal to submit to sexual advances. An adverse action taken against any individual because of his/her involvement in the reporting or investigation of a sexual abuse/sexual assault or sexual misconduct complaint.

10. **GENERAL REQUIRMENTS**

a. **Staff Notification and Training**

1) The Human Resources Management Division (HRMD) shall issue a copy of this directive to all new employees, volunteers and contract employees when they receive their photo identification card. HRMD shall require each individual to sign acknowledgement of receipt of this directive. HRMD shall retain the signed receipt.

2) The DOC Training Academy and contractor trainers shall update trainer lesson plans and review requirements of this directive with new employees, volunteers and contract employees during orientation training.

3) Mandatory Pre-Service and annual In-Service Training on the Rape Elimination Act, DC Code Title 22 Chapter 30 and this directive shall be conducted for all DOC employees, volunteers, interns, and contract employees.

4) This directive shall be made readily available to each DOC employee thereafter.

5) Certified trainers for prevention of sexual assault, sexual abuse and sexual misconduct shall conduct training.

6) Contractors shall ensure that their employees are similarly trained.

7) DOC or contract facility shall notify other individuals such as occasional service providers who have direct contact with inmates or provide services of the prohibitions and requirements of this directive.

b. **Inmate Notification and Training**

1) The CDF Warden and contractors shall ensure that within one (1) day of arrival at the respective facility each inmate receives a copy of the Inmate Handbook. The Inmate Handbook shall contain written notice of the prohibition of sexual assault, sexual abuse and sexual misconduct.

2) Within five (5) days of arrival, the CDF Warden and contract facility Administrators shall ensure that each inmate receives facility orientation and training in accordance with PS 4020.1C Inmate Orientation Program.

a) Orientation and training shall address prevention, intervention, self-protection, reporting sexual assault, sexual abuse, adjudication procedures and accessibility of medical and mental health counseling for victims.

b) Each inmate shall by signature, acknowledge training in accordance with this directive and PS 4020.1C.

3) The Hotline Number Poster (Attachment A) shall be posted in areas accessible to inmates and employees.

4) This directive shall be posted on staff and inmate bulletin boards, in each housing unit, the law library, the medical unit and other areas where inmates often frequent.

11. **IDENTIFICATION OF VULNERABLE INMATES AND PREDATORS**

a. Medical and Mental Health

1) Upon admission to the Central Detention Facility, medical and mental health staff shall, during medical and mental health screening ask the inmate questions that may determine whether the individual has been a victim of or has committed sexual violence in the past.

2) Medical and mental health staff shall be observant for other possible indications or any other information that is contained in the medical record or that is obtained from the inmate that might identify potential sexual vulnerabilities or aggressions.

3) Medical staff shall document these concerns in the electronic medical chart and promptly notify security and classification staff for appropriate inmate housing and other security safeguards.

b. Classification

1) DOC case managers shall during the intake classification process review the inmate's institutional file and all available electronic records to identify past history as well as any currently observed behavior that may indicate potential sexual vulnerabilities or aggressions.

2) Case managers shall document the information and observation and make appropriate classification and housing recommendations.

3) Prior to housing an inmate identified either as a vulnerable inmate or a predator with another inmate, the proposed housing assignment shall be reviewed and approved by the Warden, CCC Director or designee.

c. Other. All staff shall confidentially report information about an inmate's past victimization or information that an inmate might potentially be victim to recent sexual aggression to the Warden or a Deputy Warden.

12. **HOUSING INMATES IDENTIFIED AS VULNERABLE INMATES OR PREDATORS.** An inmate identified as a vulnerable inmate shall not be housed with an inmate identified as a predator. For the purposes of this directive predators are defined as inmates who have a history of sexually assaultive behavior and who are assessed as presenting a reasonable risk to vulnerable inmates.

13. **REPORTING PROCEDURES FOR INMATES**

a. **Confidential Hot Line**. Any inmate may make a confidential report of sexual assault, sexual abuse or sexual misconduct through the twenty-four (24) hour telephone Hotline at (202) 671-2851.

b. **Verbal Complaint.** An inmate may verbally inform any employee when the inmate has been subject to acts or attempted acts of sexual assault, sexual abuse or sexual misconduct. The verbal report is formal notification and the employee shall proceed as directed in Sections 14 and 15 of this directive and shall not require the inmate to submit a written report.

c. **Written Complaint**

1) An inmate may file a written complaint of sexual assault, sexual abuse or sexual misconduct directly to the Warden, CCC Director or Office Chief.

2) An inmate may file a written complaint of sexual misconduct (usually about sexual harassment or invasion of privacy) through the inmate grievance system, as described in PS 4030.1E, Inmate Grievance Procedure (IGP).

d. **Emergency Grievance.** The inmate may file the complaint directly with the Director as an "Emergency Grievance" in accordance with the emergency provisions outlined in PS 4030.1E "Inmate Grievance Program".

14. **REPORTING PROCEDURES FOR STAFF.** Any employee who receives any information, from any source, concerning sexual assault, sexual abuse or sexual misconduct or who observes an incident of sexual assault, sexual abuse or sexual misconduct shall adhere to the following:

a. **Verbal Notification.** Immediately report the information or incident directly to the Warden, CCC Director, Office Chief or the highest ranking official on duty at the time of the incident. Any allegation of sexual activity as defined in this directive shall be reported as a possible sexual assault, sexual abuse or sexual misconduct. The employee shall not conduct any inquiry or investigation into the circumstances related to the allegation.

b. **Written Notification.** Submit a written report providing any information received or observed that concerns sexual assault, sexual abuse or sexual misconduct to the Warden, CCC Director, Office Chief or the highest ranking official on duty before the end of his/her workday.

c. **Confidentiality.** Employees shall not discuss any aspect of the complaint with other employees or inmates except in accordance with this directive. Strict confidentiality shall be maintained to the extent possible at all times.

15. **MANAGERS AND SUPERVISORS**. Upon receipt of a sexual assault, sexual abuse or sexual misconduct complaint or observing an incident of sexual assault, sexual abuse or sexual misconduct, the Warden, CCC Director, Office Chief or the highest ranking official on duty shall:

a. **Verbal Notification.** Make immediate verbal notification to the Office of Internal Affairs (OIA). Any allegation of sexual activity as defined in this

directive shall be reported as a possible sexual assault, sexual abuse or sexual misconduct. The manager/supervisor shall not conduct any inquiry or investigation into the circumstances related to the allegation, except for the OIA staff.

The OIA shall immediately notify the Director when deemed appropriate.

b. **Written Notification.** Forward the original written sexual assault, sexual abuse or sexual misconduct report to OIA by the end of his/her workday.

c. **Cease and Desist Orders.** Immediately issue cease and desist orders that prohibits contact between the alleged victim and the respondent (if the respondent is an employee) while the matter is being investigated.

d. If the respondent is not on duty at the time of the allegation, the manager/supervisor shall ensure the order is issued to the respondent immediately upon return to duty.

e. **Separation Orders.** Immediately issue separation orders between the alleged victim and alleged assailant in inmate-on-inmate sexual assault, sexual abuse complaints.

f. **Housing**

1) Effort shall be made to minimize any disturbance to the alleged victim's housing location or program activities during the investigation of the complaint.

2) The alleged victim shall only be placed in protective custody or administrative segregation in accordance with PM 5300.1C, "Inmate Disciplinary and Administrative Housing Procedures".

3) The alleged assailant shall be placed in administrative segregation status, unless to do so may jeopardize the investigation. A housing hearing shall be conducted in accordance with PM 5300.1C.

g. **Sexual assault, sexual abuse.** In addition to the aforementioned responsibilities, the Warden, CCC Director, Office Chief or the highest ranking staff member on duty at the time of a reported or observed incident of sexual abuse/ assault shall:

1) Immediately notify the appropriate law enforcement authority and OIA.

2) The on-scene supervisor shall immediately secure the crime scene and ensure it is protected.

3) Ensure the alleged victim is afforded emergency medical treatment.

16. **MEDICAL TREATMENT.** Medical staff shall ensure the alleged victim is immediately given the necessary emergency medical treatment, without compromising the integrity of available physical evidence.

 a. Medical staff shall:

 1) Obtain and record a description of the sexual assault, sexual abuse in the alleged victim's own words. The victim will not receive a physical examination.

 2) Instruct the alleged victim not to bathe, shower or have a bowel movement until seen at the referring hospital.

 3) Notify the highest ranking staff immediately if the correctional staff is not aware of the incident.

 4) Record the general appearance (presence or absence of cuts, scratches, bruises, etc.), demeanor of the victim and the condition of clothes, i.e., torn or stained.

 5) Refer the victim to an outside emergency room (ER) certified to treat sexual assault, sexual abuse victims for evaluation and immediate treatment.

 6) Notify the ER physician that a sexual assault, sexual abuse victim is on his/her way to the ER.

 b. Upon return from the ER or hospital discharge, the medical staff shall:

 1) Thoroughly review the discharge instructions and carry out orders as appropriate;

 2) Validate if measures have been taken to prevent sexually transmitted diseases, HIV and Hepatitis. If preventive measures have not been taken, preventive measures shall be offered; and

 3) Refer the inmate to the mental health staff for rape counseling immediately.

17. **MENTAL HEALTH REFERRAL.** Upon return from the ER or hospital discharge, the medical staff shall ensure the alleged victim and alleged assailant are referred to the mental health staff to assess the need for counseling and supportive services.

18. **OFFICE OF INTERNAL AFFAIRS (OIA)**

 a. **Screening Complaints**

 1) OIA shall monitor the confidential Hotline for complaints of sexual assault, sexual abuse and sexual misconduct.

2) If OIA receives an allegation of sexual assault, sexual abuse or sexual misconduct via the telephone Hotline or via direct correspondence, the complaint shall be verbally reported immediately to the Warden, CCC Director or Office Chief. OIA shall provide follow-up written notification to the Warden, CCC Director or Office Chief by the close of the business day.

3) OIA shall notify local law enforcement in case of sexual assault, sexual abuse if the complaint is received directly by OIA.

4) OIA shall communicate with the appropriate law enforcement agency concerning the status of any investigation. OIA must document the status of the police investigation every thirty (30) days.

5) The occurrence of a police investigation does not relieve DOC of the duty to investigate complaints of sexual assault, sexual abuse.

6) OIA shall review each report of sexual assault, sexual abuse and sexual misconduct to determine whether the alleged conduct constitutes sexual assault, sexual abuse or sexual misconduct. OIA may interview the complainant and/or alleged victim to clarify facts concerning the complaint.

7) OIA shall notify the Warden, CCC Director or Office Chief, verbally and in writing, of each complaint regarding sexual assault, sexual abuse and sexual misconduct and whether the complaint is referred for investigation.

8) If the complaint is referred for investigation, OIA shall provide written notification to the respondent or the alleged assailant advising of the complaint, investigation procedures, confidentiality requirements and the prohibition of communication, intimidation or retaliation against the inmate.

9) The OIA Supervisor shall then forward the complaint to an Investigator. In cases where an interview was conducted with the complaint and/or alleged victim to clarify facts, intake information shall also be forwarded to the Investigator.

10) If OIA determines that the complaint does not involve sexual assault, sexual abuse or sexual misconduct, OIA shall deny the claim and shall send a notice of the rejection of the complaint to the complainant, the Warden, CCC Director or Office Chief.

11) However, if the complaint does state a violation of another departmental policy, OIA may conduct an investigation or refer the complaint to the appropriate Warden, Administrator or Office for disposition.

12) If the complaint is a third party informant, the notice will be sent to the victim.

b. **Interim Procedures During Investigation**

1) Under appropriate circumstances and with the Director's or his/her designee's approval, the respondent may be placed on administrative leave pending the outcome of an investigation.

2) To the extent possible, the respondent shall not be assigned to work in any area where he/she is likely to come into contact with the alleged complainant pending the outcome of the investigation.

3) During the investigation, the respondent shall be prohibited from making contact with the alleged complainant other than as allowable in the performance of official duties and assignment.

4) The Warden, CCC Director or designee shall decide if it is appropriate to return an employee to his/her original workplace after the investigation is completed.

5) When appropriate and necessary, the Warden may transfer the complainant or alleged victim to a comparable housing unit, to another facility or make other appropriate housing accommodations.

c. **Investigations**

1) The Corrections Corporation of America shall ensure that investigators conduct a thorough and objective investigations for incidents that are alleged at the Correctional Treatment Facility.

2) DOC investigators shall conduct a thorough and objective investigation of a complaint.

3) The investigation shall include interviewing the complainant, informant, alleged victim (if the information is received from another source), the respondent or alleged assailant and witnesses and review all documents and physical evidence.

4) The Investigator shall contact the CDF Major, CCC Director or Office Chief directly for interview scheduling and coordination. All inmates shall receive advance notice of scheduled interview and be advised of the right to legal representation. The Warden or CCC Director shall ensure that the inmate is allowed a legal call upon request to secure presence of counsel.

5) Employees have the right to legal or union representation at the time of interview.

6) If the inmate or employee being interviewed has legal or union representation, the Investigator shall explain that only the person being

interviewed shall answer the questions but he/she may consult with the representative prior to answering the question.

7) The Investigator shall advise each individual interviewed in the course of investigation that any intimidation or retaliation towards the complainant or alleged victim or disclosure of the incident that breaches confidentiality as defined in this directive, is a separate offense that is subject to disciplinary action.

8) The Investigator shall draft a statement detailing the testimony of the complainant, respondent or alleged assailant and witness(es).

9) The Investigator shall permit the employee or inmate to read and make necessary corrections/changes to the statement prior to signing it. The name of the confidential informant shall be deleted from the copies of the report distributed by the OIA.

10) The Investigator shall submit the final written report to the OIA Supervisor within ninety (90) business days (i.e., excluding Saturdays, Sundays, and legal holidays) of knowledge of the incident. The report shall include the Investigator's factual findings and a conclusion as to whether there is evidence to support a finding that sexual assault, sexual abuse or sexual misconduct has occurred.

d. **Post-Investigation Procedures**

1) OIA shall notify the Warden, CCC Director or Office Chief of the finding and forward all documentation for appropriate action. If the findings conclude that sexual assault, sexual abuse or sexual misconduct has occurred, OIA shall forward a copy of the report to the Director for action.

2) In cases involving an employee respondent, the Director shall ensure that appropriate action consistent with the District Personnel Manual or the D.C. Code.

3) In cases involving an inmate assailant, the Director shall ensure that appropriate disciplinary or criminal action is initiated.

4) OIA shall provide a written notice to the victim and respondent or alleged assailant as to whether there was evidence that supported a conclusion that sexual assault, sexual abuse or sexual misconduct occurred. The notice shall also inform the inmate of appeal procedures. The inmate shall sign acknowledgement of receipt of this notice. The original signed receipt shall be returned to the OIA.

5) In cases where the complaint was made by an individual other than the alleged victim, the third party informant/witness shall not be notified of the findings. The alleged victim shall, however, receive notification of the findings.

19. **INMATE APPEALS**

a. An inmate at the CDF, CCA/CTF or a CCC who is dissatisfied with the investigation or resolution of a complaint of sexual assault, sexual abuse or sexual misconduct, or his/her attorney may file an appeal to the Director within fifteen (15) calendar days of receiving written notice of the outcome of the investigation.

b. An inmate or his/her attorney may submit a FOIA request to the DOC FOIA Officer to review the investigation report.

c. The FOIA Officer shall review and redact the report to remove confidential information, including, but not limited to, the identity of confidential informants, medical information, personnel record information or information which will compromise security issues. A redacted and non-redacted version of the report shall be maintained in the OIA's files.

d. The Director shall notify the inmate and the Warden, CCC Director or Office Chief in writing of the results of the appeal with ten (10) calendar days.

e. The Director's Office shall forward a copy of all documents relevant to the appeal to the OIA.

f. If new evidence is received in the appeal or the Director presents other compelling evidence that supports disciplinary action against the employee, the Director's appeal decision shall be immediately forwarded to the Warden, Administrator or Office Chief for appropriate action.

g. The Warden, Administrator or Office Chief shall ensure that the inmate victim and the respondent or alleged assailant receives the Director's findings on the appeal.

h. An appeal shall not delay the implementation of any determined disciplinary action against an employee.

i. The Warden, CCC Director or Office Chief shall ensure that the Proposing Official receives a copy of the Director's findings of the appeal if disciplinary action is proposed.

20. **CONFIDENTIALITY**

a. Sexual assault, sexual abuse and sexual misconduct complaints, including the identity of the informant, the respondent or alleged assailant, the alleged victim all information and documents pertinent to the complaint, shall be handled in a confidential manner and shall only be released consistent with the provisions of the Freedom of Information Act (FOIA).

b. Any inmate who observes and reports an act of sexual assault, sexual abuse or sexual misconduct may request and be treated as a confidential informant.

c. To further maintain confidentiality, written notification of the investigation shall be prepared by OIA and issued to employees by the appropriate manager or supervisor. Inmate notification shall be handled as legal mail.

d. Each individual interviewed shall be advised that he/she is required to maintain confidentiality and not disclose to anyone information regarding the complaint, the investigation and the outcome. Staff shall also be advised that the failure to maintain confidentiality shall constitute as a separate offense subject to disciplinary action.

21. **EMPLOYEE DISCIPLINE**

a. In cases where there is a finding of probable cause for sexual assault, sexual abuse, sexual misconduct, breach of confidentiality or retaliation against staff and/or an inmate, the appropriate manager or supervisor shall ensure that disciplinary action is proposed in accordance with the regulations outlined in Chapter 16 of the District Personnel Manual. Guidelines for imposition of penalties based upon violation of this directive and DPM Chapter 16 are outlined in Attachment B.

b. The manager or supervisor shall inform OIA in writing of disciplinary action taken against the employee. He/she shall also advise the OIA in writing of actions taken pursuant to other recommendations resulting from the investigation.

c. The Hearing Officer shall notify the OIA Supervisor of any disciplinary action taken resulting from a finding of probable cause for sexual assault, sexual abuse, sexual misconduct and/or other violations of this policy or other departmental policies.

d. Managers and supervisors who fail to report or take appropriate action when sexual assault, sexual abuse or sexual misconduct against inmates are alleged or have been brought to their attention, or who fail to allow a direct order to initiate disciplinary action, shall also be subject to disciplinary action.

e. Refusal by any employee to answer questions during an official investigation may also be grounds to charge the employee for cause under Chapter 16 of the DPM.

f. DOC shall impose discipline based on a determination of probable cause that sexual assault, sexual abuse and sexual misconduct has occurred. However, this does not preclude the DOC from taking separate and distinct disciplinary measures against an employee who has later, under separate proceedings, been found in violation of Chapte16 of the DPM as a result of

a finding by the Office of Employee of Appeals, the Office of Human Rights, the Commission of Human Rights, or a court of competent jurisdiction in the District of Columbia that the employee has violated the guaranties in DC Code Title I, Chapter 6, Subchapters I, Chapter 6, Subchapters I and VII, in the performance of that employee's official duties.

g. DOC shall notify the agency of any employee not assigned to DOC of a probable cause finding so that appropriate disciplinary action may be initiated.

22. **INMATE DISCIPLINE**

a. Inmates who engage in the sexual assault, sexual abuse of another individual shall be referred for criminal prosecution. In addition, DOC shall take appropriate interim administrative actions to ensure that the predator is segregated housing for the safety of others.

b. Inmates who engage in sexual contact with another inmate shall be disciplined in accordance with PM 5300.1C.

c. An inmate reporting a complaint of sexual assault, sexual abuse or sexual misconduct may be referred for disciplinary action in accordance with PM 5300.1C if the investigation concludes that the inmate knowingly and deliberately made a false report.

23. **MONTHLY REPORTS**

a. The OIA Supervisor shall maintain statistics and prepare a monthly report that shall include the following basic information regarding sexual assault, sexual abuse and sexual misconduct complaints:

1) The number of alleged sexual assault, sexual abuse complaints filed against staff;

2) The number of alleged sexual assault, sexual abuse complaints filed against inmates;

3) The number of confirmed sexual assault, sexual abuses committed by staff;

4) The number of confirmed sexual assault, sexual abuses committed by an inmate;

5) The number of alleged incidents of sexual misconduct;

6) The number of confirmed incidents of sexual misconduct;

7) Discipline and/or other administrative actions taken against employees;

8) Discipline and/or other administrative actions taken against inmates; and

9) Referrals for criminal indictments for sexual assault, sexual abuse and sexual misconduct.

10) The number of Indictments for sexual assault, sexual abuse.

24. **RECORDKEEPING**

b. The OIA Supervisor shall maintain a central filing and reporting system for incidents of sexual assault, sexual abuse and sexual misconduct.

c. A copy of all complaints and related documentation including, but not limited to, investigative reports, correspondence, appeals and appeal findings, correspondence from attorneys and inmate or employee disciplinary action that were sent to or received from either the Director, Deputy Director, CCC Director or Office Chiefs shall be forwarded to the OIA.

d. The OIA Supervisor shall log pertinent data from these documents for tracking and management purposes.

Devon Brown
Director

Attachments:

Attachment A	Inmate Hotline Notice re: Sexual Assault and Sexual abuse
Attachment B	Employee Discipline – Guidelines for a Table of Penalties



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Testimony of Caroline Fredrickson, Director of the American Civil Liberties Union Washington Legislative Office and Elizabeth Alexander, Director of the ACLU National Prison Project
For the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security
Regarding the Prison Abuse Remedies Act of 2007 (H.R. 4109)
April 22, 2008

The ACLU and its National Prison Project welcome this opportunity to present to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security our position on the Prison Abuse Remedies Act of 2007 (H.R. 4109) and to urge the Subcommittee to support this long overdue fix of the Prison Litigation Reform Act of 1995 (PLRA).

Introduction

The American Civil Liberties Union is a nationwide, non-partisan organization with more than 500,000 members, dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. Consistent with that mission, the ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. The National Prison Project (NPP) is the only program in the United States that litigates conditions of confinement cases on a national basis; at any given time we have cases pending in twenty to twenty-five states.

The NPP has over 36 years of experience advocating for humane conditions in America's prisons. We know that prisons by their nature present an ever-present threat of abuse because prison officials—of necessity—are given enormous power over the lives and well-being of their charges. In order to prevent abuse of that power, prisons need effective forms of oversight to ensure that public officials cannot violate their legal obligations with impunity. In our nation, the federal courts have traditionally provided this necessary oversight because they ensure that no matter how disfavored and disenfranchised the individual, he or she has the opportunity to seek vindication of his or her rights in the courtroom. Indeed, through the implementation of oversight by the federal courts in the 1970's and 1980's, the country's prisons were transformed—from dungeons that betrayed American ideals of innate human dignity—to modern, correctional institutions.[1]

This progress took many years to achieve, and it requires constant vigilance to maintain. Nonetheless, by the mid-1990s some began to argue that prison litigation had become as much a problem as a solution, by producing too many frivolous lawsuits that took up the time of the courts and correctional officials. Congress responded to these concerns by passing the Prison Litigation Reform Act of 1995 as part of an appropriations bill and the PLRA became law on April 26, 1996.[2]

In passing PLRA, however, it was never the intention of Congress to prevent the federal courts from addressing the serious constitutional violations and assaults on human dignity that were prevalent in America's prisons before the courts began to ensure that rule of law prevailed in those institutions. Indeed, both the House and Senate sponsors of the bills that became the PLRA noted that the Act was not intended to interfere with meritorious conditions of confinement cases. Indeed, a sponsor of the law, Representative Charles T. Canady (R-Florida), stated that the

[1] *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1979); *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977).

[2] Pub. L. 104-134 (Apr. 26, 1996).

PLRA's provisions "will not impede meritorious claims by inmates but will greatly discourage claims that are without merit."[3]

Now that we have over eleven years of experience with the effects of the PLRA, it is apparent that the Act has been quite effective in reducing the burden of frivolous prisoner litigation. The year before PLRA was enacted, prisoners and jail detainees filed federal cases at a rate of 26 per thousand prisoners; a decade later, the rate had decreased to eleven per thousand.[4]

At the same time, however, PLRA has had a disastrous effect on the ability of prisoners, particularly prisoners without access to counsel, to have their non-frivolous cases adjudicated on the merits. Certain provisions of the PLRA have kept countless serious prisoner claims from reaching the courts, including claims of brutal physical and sexual abuse; gross mistreatment of incarcerated children; disgusting and inhumane conditions; and deadly refusals to provide medical and mental health treatment. The Prison Abuse Remedies Act (PARA) addresses these unintended consequences of the PLRA by amending the Act to restore prisoners' ability to challenge conditions of confinement that violate their constitutional rights while preserving the provisions that effectively weed out frivolous lawsuits.

The Prison Abuse Remedies Act (PARA)

PARA presents a thoughtful response to a very complex problem. It carefully balances the need to allow courts to exercise their role in protecting the constitutional rights of prisoners with the need to reduce the burden of frivolous lawsuits. PARA thus leaves the core of the PLRA intact. This core is the PLRA's Preliminary Screening Requirement. Under this requirement, courts are required to summarily dismiss *all* prisoner cases that are frivolous, malicious, fail to state a legal claim on which relief can be granted, or that seek damages from a defendant who is immune from them. These claims are dismissed without service of process on the defendants and without requiring prison officials or their attorneys to respond.[5]

The Preliminary Screening Requirement is the successful provision of the PLRA that achieves the stated ends of the law. Other provisions of the PLRA, however, have gone too far and these are the provisions that the PARA addresses.

The NPP supports PARA in its entirety. Below we discuss the pertinent sections of PARA, why they are needed to correct the excesses of the PLRA, and how each provision improves oversight and accountability in our nation's prisons.

Section 2 - Showing of Physical Injury Not Mandatory for Claims (42 U.S.C. § 1997e(e); 28 U.S.C. § 1346(b)(2))

[3] 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995).

[4] U.S. Dep't of Justice Office of Justice Programs Bureau of Justice Statistics, http://www.uscourts.gov/judicial_business/c2 asep97.pdf; Margo Schlanger & Giovanna Shay, American Const. Soc'y, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act* 2 (2007), available at http://www/acslaw.org/files/Shlanger%20Shay%20PLRA%20Paper%203-28-07.pdf.

[5] 28 U.S.C. 1915(c)(2); 28 U.S.C. 1915A; 42 U.S.C. 1997c(c)(1).

The PLRA Problems: The "physical injury" requirements of PLRA set forth in 42 U.S.C. § 1997e(e) and 28 U.S.C. § 1346(b)(2) epitomize the unintended consequences of some provisions of the law. These provisions require that, in order to sue for compensatory damages in a civil rights case in federal court, prisoner must demonstrate a physical injury before he or she can win damages for mental or emotional injuries.[6] Many of the unintended consequences flow from the fact that most federal courts have applied this provision to bar damages claims involving all constitutional violations that intrinsically do not involve a physical injury.[7]

Under the PLRA, federal courts bar prisoners from seeking recompense in cases where important constitutional rights are implicated. The following are a few examples of cases in which prisoners are denied relief because they have no "physical injury":

- Actions challenging the denial of prisoners' religious rights guaranteed by the Constitution and protected by Congress in the Religious Land Use and Institutionalized Persons Act;[8]
- An action challenging sexual assault including forcible sodomy in the absence of other physical injury;[9]
- Cases challenging a prisoner's false arrest and illegal detention;[10]
- A case where prison officials failed to protect a prisoner from repeated beatings that resulted in cuts and bruises.[11]
- An action challenging placement in filthy cells and exposure to the deranged behavior of psychiatric patients;[12]
- A challenge to a prison official's deliberately causing a prisoner to experience pain and depression by denying him psychiatric medications;[13] and
- A case of deliberate, unauthorized disclosure of a prisoner's HIV-positive status.[14]

The cases represent serious unconstitutional conditions, but PLRA leaves the courts with few options to remedy such violations.

[6] Some courts have held that the "physical injury" requirement bars compensatory damages but not nominal or punitive damages. *See, e.g., Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). *But see Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

[7] *See, e.g., Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004) (damages are not available based on retaliation for exercise of First Amendment rights); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002) (violation of due process rights); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (damages are not available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (damages are not available for violation of privacy rights). *But see Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (damages are available for violation of First Amendment rights if prisoner is not seeking compensation for mental or emotional injury); *Cannell v. Lightner*, 143 F.3d 1210 (9th Cir. 1997) (allowing damages for violations of religious rights).

[8] 42 U.S.C. § 2000cc-(1)-(2) (2007). For examples of cases denying compensatory damages for violations of religious rights, *see Searles, supra* note 7; *Allah, supra* note 7. *But see Cannell, supra* note 7.

[9] *See Hancock v. Payne*, 2006 WL 21751 at *1, 3 (S.D. Miss. Jan. 4, 2006) (complaints that officers forcibly sodomized prisoners barred by provision); *Smith v. Shady*, 2006 WL 314514 at *2 (M.D. Pa. Feb. 3, 2006) (complaint that correctional officer grabbed penis barred by provision).

[10] *Young v. Knight*, 113 F.3d 1248, 1997 WL 297692 (10th Cir. June 5, 1997); *see also Colby v. Sarpy Co.*, 2006 WL 519396 (D. Neb. Mar. 1, 2006) (dismissal of a claim of wrongful confinement for four months).

[11] *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997).

[12] *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).

[13] *Weatherspoon v. Valdez*, 2005 WL 1201118 (N.D. Tex. May 17, 2005).

[14] *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998).

The PARA Fix: The PLRA's "physical injury" requirement serves no useful function because the Preliminary Screening Requirement of the law already disposes of truly frivolous cases. Instead, this provision of PLRA merely interferes with the ability of prisoners who have suffered real violations to be made whole under our legal system. PARA addresses these inequities created under the PLRA by eliminating the mandatory physical injury requirement for seeking compensatory damages set forth in 42 U.S.C. § 1997e(e) and 28 U.S.C. § 1346(b)(2). Thus, a prisoner with a meritorious constitutional claim will be able to seek compensatory damages for the violation of his or her rights – just like any other civil rights plaintiff.

Section 3 – Staying of Non-frivolous Civil Actions to Permit Resolution through Administrative Processes (42 U.S.C. § 1997e(a))

The PLRA Problems: The PLRA requires courts to dismiss a prisoner's case if he or she has not satisfied all internal complaint procedures at his facility prior to filing suit. 42 U.S.C. § 1997e(a). On the face of it, this is a sound idea. We want to encourage correctional facilities to manage problems and improve conditions without court intervention. Unfortunately, in practice, this provision of PLRA has done the most damage to the ability of prisoners to present meritorious constitutional claims.[15]

This is true for a number of reasons. First, there is the reality of prisoner demographics. Prisoners, as a general matter, have very low rates of literacy and education.[16] Moreover, the number of severely mentally ill and cognitively impaired persons in prison is staggering. According to the most recent report by the U.S. Department of Justice, Bureau of Justice Statistics, 56% of State prisoners, 45% of Federal prisoners, and 64% of jail prisoners in the United States suffer from mental illness.[17] And experts estimate that people with mental retardation may constitute as much as 10 percent of the prison population.[18] As a result, the PLRA's exhaustion requirement has proven to be a trap for the unschooled and the disabled.

Second, there is the reality of how prison internal complaint procedures or grievance systems often operate. Deadlines are very short in many grievances systems, almost always a month or less, and not infrequently five days or less.[19] Nonetheless, these deadlines, many measured in

[15] *See* Giovanna E. Shay & Joanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA)*, 29 Cardozo Law Review 291, 321 (2007) (reporting that in a study of cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378 (2006), all claims survived exhaustion in fewer than 15% of reported cases).

[16] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (2003), available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102.

[17] James, Doris J. & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates, Bureau of Justice Statistics Special Report* 1, Department of Justice, Bureau of Justice Statistics, December 14, 2006.

[18] Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at www.thearc.org/faqs/crimqa.html.

[19] *See Woodford v. Ngo*, *supra* note 15 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two to five days).

hours or days rather than weeks or months, operate as statutes of limitations for federal civil rights claims. Moreover, a typical system does not have just one deadline that could lead to forfeiture of a claim; it may have three or more such deadlines as prisoners must appeal to various levels of a grievance system.[20]

Other technical obstacles arise all the time that lead to prisoners being denied their right to sue. The rules may require that grievances be submitted only on approved forms, and the forms may not be available.[21] The forms may be available, but only from the staff member who is responsible for the action the prisoner wishes to challenge.[22] Many grievance system rules give administrators discretion not to process grievances if the prisoner has filed too many; some systems also require that only one subject be raised on each grievance submitted.[23] Further, it is a routine practice for grievances not to be given responses by staff in a timely manner, whether or not the system rules indicate a deadline for staff responses. There may be ambiguity about what issues are grievable, or a difference between what the rules say and actual practice by administrators. Even a highly educated prisoner, or the rare prisoner with access to legal advice, will be unsure how to proceed when there is no literal way to comply with the rules in circumstances like these.[24] For illiterate, mentally ill, or cognitively challenged prisoners, these convoluted administrative systems are virtually impossible to navigate. Thus, constitutional claims for many of the most vulnerable are lost irrevocably under PLRA because of technical misunderstandings rather than lack of legal merit.

Another problem with the current exhaustion requirement of PLRA is the insurmountable obstacle it creates for the prisoner with a meritorious claim who needs immediate injunctive relief.[25] As currently written, PLRA requires that a prisoner go through all the levels of the grievance system until the system provides a final decision, even though a particular system may require three to six months to fully exhaust. In such cases, the PLRA exhaustion requirement completely prevents litigation of the claim for relief.

Third, there is a well-established practice of threatening and retaliating against prisoners who file grievances. Under some grievance regimes, prisoners are even forced to obtain grievance forms from or file their grievances with the very same persons who have abused them or violated their

[20] Appendix A of this testimony provides a typical grievance form used in the Maryland Department of Correction along with the detailed "Steps for Filing Grievances" handout that the ACLU of Maryland developed to try to help prisoners understand the actual procedural steps involved in completing the grievance process.

[21] *See, e.g., Spaulding v. Oakland Co. Jail Medical Staff*, 2007 WL 2336216 at *2 (E.D. Mich. Aug. 15, 2007) (lawsuit dismissed despite prisoner's claim that he was unable to obtain required grievance form).

[22] *See, e.g. Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001) (prisoner failed to exhaust because grievance system refused to consider grievance submitted on wrong form).

[23] See, *e.g., Harper v. Laufenberg*, 2005 WL 79009 at *3 (W.D. Wis. Jan. 6, 2005) (prisoner failed to exhaust because grievance system refused to consider grievance that it considered to raise two complaints rather than one).

[24] These are all problems that staff at the National Prison Project encounter routinely as we attempt to advise prisoners on how to avoid losing their rights to sue.

[25] *See, e.g., Williams v. CDCR*, 2007 WL 2384510 at *4 (E.D. Cal., Aug. 17, 2007) (claim of suffering from food poisoning); *Ford v. Smith*, 2007 WL 1192298 at *2 (E.D. Tex., Apr. 23, 2007) (claim of threat to personal safety); *Aburomi v. United States*, 2006 WL 2990362 at *1 (D.N.J., Oct. 17, 2006) (claim of cancer recurrence needing immediate treatment).

rights in some way. Many prisoners are simply too afraid to file grievances for fear of the consequences—and with good reason.[26]

Further, too often, there is an inverse relationship between the responsiveness of the grievance system and the importance of the issue. Even if routine complaints are handled reasonably well, grievances that implicate misconduct or abuse by prison staff, such as complaints about serious injuries, are the most likely to be subject to a strict interpretation of the system's rules or to simply disappear. Because of the likelihood that a decision that the prisoner failed to exhaust according to the grievance system's technical rules will immunize the potential defendants from both damages and injunctive relief,[27] the PLRA establishes an incentive for prison officials to use their grievance systems as a shield against accountability, rather than an effective management tool.

The PARA Fix: Section 3 of PARA strikes the balance between promoting effective internal prison management and preserving important prisoner rights. PARA amends the PLRA's exhaustion provision set forth in 42 U.S.C. § 1997e(a) by allowing the court to stay a case for 90 days if a prisoner has failed to present his claim for administrative review before filing a federal suit. During those 90 days, prison officials are allowed to consider the complaint and resolve it before the litigation proceeds. PARA thereby ensures that correctional agencies are afforded a real opportunity to review a prisoner's complaint before a federal court hears it. This legislative fix provides an incentive for correctional agencies to solve problems while at the same time not allowing prisoners the opportunity to bypass internal review of their complaints. PARA accomplishes these important goals, but unlike the PLRA, it does so without undermining meritorious civil rights claims.

Recognizing the realities of prisoner's lives and correctional management, PARA also reverses the overly technical interpretations of the PLRA exhaustion requirement that courts have added since the law's enactment. Instead of requiring strict technical compliance with complicated grievance procedures, PARA re-establishes the spirit of administrative exhaustion by requiring a "reasonable notice" standard for prisoner complaints. PARA requires that prior to filing suit a prisoner must give prison officials within the facility in which his or her claim arose, reasonable notice of that claim. And the prisoner must comply with this provision within the generally applicable limitations period for filing suit.

Section 4 – Exemption of Juveniles from the Prison Litigation Reform Act (18 U.S.C. § 3626; 42 U.S.C. § 1997e; 28 U.S.C. § 1915; 28 U.S.C. § 1915A)

The PLRA Problem: The stated purpose of the PLRA has always been to reduce frivolous prisoner litigation. And as we noted above, it has accomplished this goal, but it has also gone too far. The inclusion of child prisoners under the PLRA is perhaps the most glaring example of this

[26] *See, e.g., Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), cert. denied, 535 U.S. 1095 (2002).

[27] *See Woodford, supra* note 15 (prisoner who has not complied with rules of the grievance system has failed to exhaust, so lawsuit must be dismissed).

problem. Incarcerated youth do not file lawsuits—frivolous or otherwise. They simply were never part of the problem the PLRA was designed to address.

At the same time, youth are especially vulnerable to abuse in institutions, and so the need for court oversight if abuse occurs is particularly important. The recent revelation of widespread sexual abuse within the Texas juvenile system, in which boys and girls were sexually and physically abused by staff, and faced retaliation, including being thrown into an isolation cell in shackles if they complained, is just one example of the potential for child abuse in unmonitored correctional institutions.[28] Unfortunately the Texas scandal is not an isolated event; staff sexual and physical abuse and harassment of youth in custody has been an issue from New York to Hawaii.[29] Because youth in custody are uniquely at risk for abuse and because confined youth have never been a source of frivolous litigation, none of the restrictions in PLRA should apply to these youth.

The PARA Fix: PARA provides the greater protections that incarcerated youth need. Recognizing their special vulnerabilities and the fact that they were never part of the problem the PLRA sought to fix, Section 4 of PARA revises the definition of prisoner in all the various sections of the PLRA so that the law is no longer applicable to incarcerated kids who are under 18 years of age.

Section 5 – Modification of Ban on Multiple *In Forma Pauperis* Claims (28 U.S.C. § 1915(g))

The PLRA Problem: Under the PLRA, a prisoner who has three complaints or appeals dismissed as frivolous or malicious, or for failure to state a claim, is forever barred from filing a claim or an appeal if he or she cannot pay the full filing fee up-front—regardless of indigent status.[30] Since few prisoners have the $350 filing fee at their disposal, this provision creates a lifetime ban from the federal courts in most circumstances.

While no one wants to encourage the filing of frivolous actions, the penalties should not be so severe as to bar claims such as racial discrimination, sexual abuse, and religious discrimination because the prisoner made three mistakes in filing a case. First, it is particularly difficult for prisoners to know if a complaint is frivolous or does not state a claim because they currently have few sources of accurate legal advice or information. Only 1% of all prisoner cases even involve

[28] *See* Gregg Jones, et al., *TYC Facilities Ruled by Fear,* Dallas Morning News, March 18, 2007, available at http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/031807dnprotycrctalii.

[29] *See, e.g.*, Stop Prisoner Rape, The Sexual Abuse of Female Inmates in Ohio (Dec. 2003), available at http://www.spr.org/pdf/sexabuseohio.pdf (including discussion of sexual assaults by staff in juvenile wing of facility); American Civil Liberties Union of Hawai'i, "Hawai'i Youth Correctional Facility to Pay Over Half a Million Dollars for 'Relentless Campaign of Harassment' of Gay and Transgender Youth" (June 15, 2006) (threats of violence and physical and sexual assault), available at http://www.acluhawaii.org/news.php?id=24; Letter from Deval Patrick, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 2006, available at http://www.usdoj.gov/crt/split/documents/lajuvfind3.htm (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls 44-56, 63-71 (2006).

[30] The PLRA provides a limited exception to this rule if prisoner is experiencing an "imminent danger of serious physical injury." *See* 28 U.S.C. § 1915(g) (2007).

private attorneys.[31] And since the Supreme Court's 1996 decision in *Lewis v. Casey* substantially cut back on the scope of the constitutional right of prisoners to assistance in filing complaints, many correctional systems have discarded their law books and shut down programs to assist prisoners in filing meaningful legal papers.[32]

Further, it is frequently not easy for anyone to determine whether a particular complaint is frivolous or fails to state a claim—even trained professionals. Courts routinely dismiss cases for "failure to state a claim" even where licensed attorneys are handling the cases. Moreover, courts themselves frequently disagree over the legal standards for "failure to state a claim" and such disputes often reach up to the Supreme Court. Given that attorneys and judges are not held to an absolute understanding of what exactly constitutes "failure to state a claim" under the law, it makes little sense to impose such a severe and incomprehensible standard on unrepresented, often barely literate prisoners.

The PARA Fix: Section 5 of PARA preserves the purpose of the PLRA to discourage frivolous litigation while ending the draconian application of the lifetime ban on a prisoner's qualification for indigent status. First, PARA limits the scope of the provision from all suits ever filed in a prisoner's lifetime to "the preceding five years." This provision prevents so-called "frequent flyers" from abusing the indigency provisions while placing a reasonable limit on the law's application.

PARA also recognizes that the goals of reducing frivolous litigation can be satisfied by limiting the application of this provision to prisoners who file malicious lawsuits, rather than the broader category of prisoners who make legal mistakes or simply do not understand what claims may be redressed under the law. It should be noted that PARA's fix to the PLRA does not prevent federal courts from applying appropriate sanctions on an individual basis to prisoners who are found to abuse the indigency provisions.[33]

Section 6 – Judicial Discretion in Crafting Prison Abuse Remedies (18 U.S.C. § 3626)

The PLRA Problems: PLRA contains a number of restrictions on the powers of federal courts to issue effective relief in prison conditions litigation. Together and separately, these various restrictions work to make it more difficult to eliminate dangerous and degrading conditions in our nation's prisons.

Unnecessary Interference with Injunctive Standards: PLRA provides a set of standards that are supposed to limit the power of federal courts to issue injunctions in prison conditions cases. This language originally led to confusion in the courts because it reiterates the Article III justiciability requirement that a court find a violation of individual prisoners' rights in order to enter relief. These provisions, however, simply reflect the standards for injunctive relief previously developed

[31] *Johnson v. Daley*, 339 F.3d 582, 601 (7th Cir. 2003) (Diamond Rovner, J., dissenting) (internal citations omitted).

[32] *Lewis v. Casey*, 518 U.S. 343 (1996).

[33] *See, e.g., Olivares v. Marshall*, 59 F.3d 109 (9th Cir. 1995) (in a case pre-dating PLRA, holding that the district judge was entitled to impose partial filing fee on indigent prisoner who appeared to be manipulating indigency status).

in the federal courts and so they do not by themselves change the law applicable to injunctive relief in prison cases.[34]

Interference with Emergency Judicial Relief: PLRA limits all preliminary injunctions in conditions of confinement cases to 90 days.[35] As a result, even if a court finds that prisoners face an imminent threat of physical harm, its preliminary injunction may expire before the court can hold a full trial and decide whether final injunctive relief is warranted.

Promotion of Frequent Mini Trials and Termination of Relief: Some of the greatest harm from the PLRA restrictions on the powers of federal courts comes from the provisions that allow prison officials to repeatedly challenge injunctions, and the provisions that require the complete termination of injunctions if the court fails to find a constitutional violation at the time of retrial. Under PLRA, the court is required to retry, at the defendants' request, any award of injunctive relief two years after the relief was first granted, and every single year thereafter. In addition, the court must terminate injunctive relief unless there is a "current and ongoing" constitutional violation. In other words, the only injunction that a federal court is authorized to continue after such a retrial is an injunction that has not worked to eliminate the constitutional violation. If the injunction has worked, but the constitutional violation is **highly likely** to return in the absence of the injunction, that injunction must nonetheless terminate. This limitation on the power of the courts to prevent constitutional violations applies even if the defendants intend to begin violating the law just as soon as the injunction is lifted. In fact, even where defendants have announced their intention to begin violating the Constitution once court review is suspended, courts must still terminate injunctive relief under PLRA![36]

Prevention of Settlement: Another unjustified limit on the powers of the federal courts is the provision of PLRA that bars public officials from entering into consent decrees unless they admit a violation of law.[37] This PLRA provision undermines our system of settlement in the federal courts because it eliminates the advantages of settling meritorious cases. For example, PLRA leaves officials with the choice of engaging in expensive and time-consuming litigation that they expect to lose because they know conditions are dangerous and disgusting or admitting to liability that is likely to haunt them in any damages actions growing out of the conditions. Given these options, political reality often forces officials to engage in litigation where they would otherwise settle if PLRA did not interfere. As a result, instead of reducing the burden of prison litigation, PLRA often adds to that burden because it prevents settlement of meritorious cases.

[34] *See Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000) (except for the limitations on consent decrees, the prospective relief provisions of PLRA reflect "essentially the same" limits on federal injunction as does the general law because no injunction should require more than is necessary to correct the underlying constitutional violation); *Smith v. Ark. Dep't of Correction*, 103 F.3d 637, 647 (8th Cir. 1996) (PLRA merely codifies existing law and does not change the standards for whether to issue an injunction).

[35] 18 U.S.C. § 3626(a)(2) (2007).

[36] *See Para-Prof'l Law Clinic at SCI-Graterford v. Beard*, 334 F.3d 301, 304 n.1, 306 (3d Cir. 2003) (PLRA requires termination of injunctive relief even though defendants have announced plans that are likely to lead to a return of the constitutional violation); *see also Castillo v. Cameron County*, 238 F.3d 339, 353 (5th Cir. 2001); *Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000).

[37] 18 U.S.C. § 3626(c) (2007) prohibits federal courts from approving consent decrees that omit findings that the relief is necessary to correct a violation of the Constitution or other federal law by subjecting consent decrees to the same jurisdictional limits that apply to contested orders pursuant to 18 U.S.C. § 3626(a) (2007).

Automatic Stay of Judge-Ordered Relief: The PLRA's automatic stay provision requires that if a party merely files a motion to terminate or modify an existing injunction, the court must suspend the relief within 30 days until the motion is ruled upon.[38] This means that, if the court is unable to reach a final decision on whether the defendants are still violating the Constitution because of the complexity of the issues or congestion in the court's docket, the injunction is suspended and the adjudicated constitutional violations may resume.[39] This provision of the PLRA deprives plaintiffs of previously ordered relief. Further, because the stay provision is automatic and mandatory, it gives some defendants a perverse incentive to file repeated motions to terminate prospective relief before the relief has actually accomplished the results originally ordered by the court.

The PARA Fixes: Although PLRA alters the playing field for prison reform cases in a multitude of ways, PARA does not seek to alter the vast majority of the PLRA's prospective relief provisions under 42 U.S.C. § 3626. Instead, it seeks to restore the most fundamental judicial powers of the federal courts to enter orders remedying prison conditions that violate the law. It accomplishes this task by providing narrowly tailored fixes to the most harmful provisions and by removing unnecessary and confusing language in the law.

Elimination of Unnecessary Interference with Injunctive Standards: PARA eliminates the confusing language of Section 3626(a)(1)(A), (B) and (b)(2)-(3). As mentioned above, this language has been considered unnecessary by the courts and should therefore be stricken. Striking Section 3626(a)(1)(A) also frees the courts to allow settlement of cases between litigants more readily because it removes the requirement that courts have to find a violation of a federal right in order to approve a settlement. In order to effectuate this discretion in the law, PARA also strikes paragraphs (b)(2) and (b)(3) of Section 3626. PARA's revisions of Section 3626 do not, however, undermine the requirement that any proposed relief by the court be narrowly drawn and minimally intrusive.

Restoration of the Courts' Discretion to Issue Necessary Emergency Judicial Relief: Under PLRA prisoners can be denied the protections all other persons receive under our laws because the courts simply run out of time. Recognizing this problem, PARA restores the ability of the courts to issue emergency relief for longer than 90 days, if such relief is necessary, by striking the final sentence of Section 3626(a)(2).

Rationalization of the PLRA's Termination Provisions: The PLRA created an alternate framework for the monitoring of injunctive relief. PARA seeks to rationalize this framework so that it operates to lessen the burden on courts and equalize the burden on defendants and plaintiffs. In Section 3626(b)(1)(A), PARA adds language to clarify that termination of prospective relief requires the party moving for termination to prove: (1) that the violation of the federal right that is the subject of the prospective relief has been eliminated; and (2) that the violation of the right is "reasonably unlikely" to recur. This change reflects the need to hold rights violators accountable for curing their present violations and to ensure that violators know they are also responsible for ensuring that violations do not occur in the future.

[38] 18 U.S.C. § 3626(c)(2) (2007). If good cause is shown, the court can extend the automatic stay of relief to 90 days. 18 U.S.C. § 3626(e)(3) (2007).
[39] 18 U.S.C. § 3626(c) (2007).

PARA also changes—but does not eliminate—the automatic termination provisions of PLRA. In Section 3626(b)(1)(B), PARA gives discretion to the federal court to extend the time limits for termination of prospective relief on a case-by-case basis. In order to extend these time limits, however, the court must find at the time of granting or approving relief that correcting the violation will take longer than the time periods laid out in PLRA. This discretion is especially important because many cases obviously are far too complicated to resolve in one or two years and the PLRA's imposition of the automatic termination provisions unnecessarily burdens the courts with frequent re-litigation of known violations. PARA recognizes that judges themselves are most frequently in the best position to determine the time needed to cure violations and for the relief ordered to have its effect.

Removing Barriers to Settlement: PARA affirms the importance of settlement in our judicial system and recognizes that when cases have merit, the goal should be for all parties to come to a mutually agreeable settlement. Because PLRA prevents this goal by forcing defendants to admit the violation of a federal right before a settlement can be approved, PARA eliminates this provision of the law by striking both Section 3626 (a)(1)(A) and (c)(1).

Elimination of Automatic Stay of Relief: PARA recognizes that court-ordered relief should not be suspended automatically just because one party in a lawsuit files a motion to terminate or modify relief. Courts order injunctive relief after much deliberation and this relief should not be suspended without the benefit of equally serious deliberation. Given the realities of court dockets and the complex nature of prisoner cases, even 90 days is often insufficient time for courts to rule on such motions. PARA therefore removes Sections 3626(e)(2)-(e)(4) from PLRA so that courts and prevailing parties are no longer burdened by the automatic stay provision. At the same time, PARA does not interfere with the PLRA's requirement that judges rule on such motions in a timely manner.[40]

Section 7 – Restore Attorneys Fees for Prison Litigation Reform Act Claims (42 U.S.C. § 1997e(d))

The PLRA Problem: Under current law, civil rights plaintiffs who prove their cases are generally entitled to recover reasonable attorneys' fees. This rule, created by Congress in 42 U.S.C. § 1988, grew out of the recognition that many victims of civil rights violations would never be able to obtain legal representation without a fee-shifting provision, and therefore serious civil rights abuses would go unchecked. As a result, Section 1988 provides payment of a reasonable fee to prevailing parties in civil rights litigation. Under Section 1988 fees are not possible for a frivolous case. In fact, sanctions may be imposed by the court for such litigation.

Despite the intent of Congress expressed in Section 1988, and the existing protections against frivolous litigation embodied in that law, the PLRA limits recovery of Section 1988 attorneys' fees by imposing a fee-cap on the hourly rate lawyers may recover in successful cases; the cap is far below market rates. PLRA further limits recoverable attorneys' fees by requiring that a fee award be no more than 150% of any damages awarded to the plaintiff. Therefore, if a plaintiff is awarded $1.00 in nominal damages, the attorney is awarded $1.50 in fees, regardless of the quality

[40] 18 U.S.C. § 3626(c)(1) (2007).

of work done, hours expended, or the importance of the constitutional right vindicated. Such nominal damage awards are not uncommon in prisoner civil rights cases where juries dislike the plaintiff even though they acknowledge the liability of defendants, or where they are unsure what value to place on the violation of a constitutional right.[41]

PLRA imposes restrictions on prisoner cases that are not imposed on other civil rights cases, and that have nothing to do with the purpose of PLRA; by definition, cases in which the prisoner prevails by proving a violation of the Constitution or federal statute are not frivolous. PLRA fee restrictions do nothing to alter the status quo for the prisoner who brings the frivolous or trivial lawsuit. It serves only to create a significant disadvantage for those presenting significant, meritorious challenges.

The results of the PLRA fee restrictions are devastating. While a few major law firms have done heroic work in this area by undertaking *pro bono* litigation,[42] many small law offices that specialize in general civil rights cases have stopped taking prisoner cases.[43] The fees provisions of PLRA, which are of substantially more concern to lawyers in solo practice or in small firms than to practitioners in large firms, have thus contributed to a substantial decline in the number of lawyers who will consider taking a prisoners' rights case, a trend exacerbated by the ban on representation of prisoners imposed on the Legal Services Corporation.[44] It has also been the experience of the NPP that lawyers around the country, who formerly were willing and able to take on important prisoner civil rights cases, can no longer do so because of the harsh economic disincentives established under PLRA.

The PARA Fixes: Because prisoners are uniquely at risk of abuse, it is particularly dangerous to make it difficult for prisoners to obtain lawyers. Accordingly, it is critically important that the few lawyers willing to handle such cases have the incentives that are provided in other civil rights cases to ensure that constitutional protections remain a reality in practice as well as theory. Since removing the current disincentives for legal representation of prisoners cannot undermine the goal of discouraging frivolous prisoner litigation, this provision of PLRA is repealed under PARA. PARA therefore returns prisoner cases to the status quo for all civil rights litigants under Section 1988—a status quo that prohibits fees for frivolous litigation, but allows a prevailing party to petition the court for "a fee large enough to induce competent counsel to handle the plaintiff's case, but no larger."[45]

Section 8 – Filing Fees *In Forma Pauperis* (28 U.S.C. § 1915(b)(1))

[41] *See Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) (awarding $1.00 and $1.50 in fees where pre-trial detainee was bound into a restraint chair with a towel over his mouth and lost consciousness).

[42] Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. Law Rev. 550, 601 (2006) (noting that there has been an increase in pro bono litigation by large firms)

[43] This statement is based on the experience of staff of the National Prison Project in providing advice and support to private lawyers litigating conditions of confinement claims in the eleven years since PLRA; *but see* Schlanger, *supra* note 42 (finding insufficient evidence to express an overall conclusion on the effect on private litigators of the restrictions in PLRA).

[44] *See* Omnibus Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(15), 110 Stat. 1321, 1321-55.

[45] *Simpson v. Sheahan*, 104 F.3d 998, 1002 (7th Cir. 1997).

The PLRA Problem: The PLRA radically changes the standards for the access of indigents to our courts. Under PLRA, indigent prisoners, unlike any other category of indigent litigants in the federal courts, must pay the entire filing fee of $350 in the district court. At the time of filing, a percentage of the prisoner's available funds must be paid, with the remainder subtracted from his or her institutional account over time.[46] Given that many prisoners have no work options, and even those prisoners who are allowed to work earn just a few dollars a day at best, this provision enormously penalizes prisoners, especially those who file meritorious claims.

The PARA Fix: PARA recognizes that imposing filing fees effectively discourages frivolous lawsuits by prisoners. At the same time, however, the current exclusion of all prisoner suits from indigent status goes too far and places an enormous burden on poor prisoners with legitimate claims. In order to cure this problem, PARA requires that only those prisoners who file cases that are quickly dismissed under PLRA's Preliminary Screening Requirement for being frivolous, malicious, failing to state a claim, or seeking monetary relief from a defendant who is immune from such relief, are required to pay the entire $350 filing fee over time. Prisoners who file *non-frivolous* lawsuits and appeals are to be treated like all other indigent litigants.

[46] *See* 28 U.S.C. § 1915(a), (b) (2007).

TESTIMONY OF LISA FREEMAN AND DORI LEWIS,

NEW YORK CITY LEGAL AID SOCIETY,

IN SUPPORT OF REFORM OF

THE PRISON LITIGATION REFORM ACT

Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on H.R. 4109, the "Prison Abuse Remedies Act of 2007"

April 22, 2008

TESTIMONY OF LISA FREEMAN AND DORI LEWIS, NEW YORK CITY LEGAL AID SOCIETY, IN SUPPORT OF REFORM OF THE PRISON LITIGATION REFORM ACT

We are attorneys at the Prisoners' Rights Project of the New York City Legal Aid Society, which represents New York State and City prisoners in class action and test case litigation, advocates for them with prison and jail agencies, and advises them of their legal rights. We are counsel, with the *pro bono* assistance of the law firm of Debevoise & Plimpton, in *Amador, et al., v. Andrews, et al.*, a federal civil rights action challenging a pattern of sexual abuse of women prisoners by male staff in the New York State prisons, and the administrative policies that have in effect granted impunity to the officers preying upon these women and have permitted this conduct to continue without remedy for years. We appreciate this opportunity to testify about the devastating effects of the PLRA on the protection of the civil rights of the most vulnerable in our society.

Although intended to weed out only unmeritorious prisoner litigation, the Prison Litigation Reform Act (PLRA) has created virtually insurmountable barriers to redress for systematic violations of basic human rights, and must be amended accordingly. In particular, the PLRA fails to account for the special circumstances of women who have been the victims of sexual assault in prison, and, as a result, effectively deprives them of access to the courts. The special needs of victims of sexual assault in prison, in general, and of women prisoners, in particular, have been well-recognized and well documented in recent years. *U.S. Prison Rape Elimination Act*, 42 U.S.C. § 15602; AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN 17 (2001); HUMAN RIGHTS

WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 449-452 (1996). Nonetheless the draconian effect of the PLRA on this population has not been addressed.

In *Amador, et al. v. Andrews, et al.*, sixteen women allege rape and sexual abuse by New York State Department of Correctional Services (DOCS) officers and have sought to challenge DOCS' policies and procedures enabling their abuse, as well as to obtain damages for the assaults they suffered. Rather than being able to present their complaints on the merits, these women have spent four years litigating the issue of exhaustion under the PLRA, and have now been denied the opportunity to present their claims in court.

These women filed a complaint in January 2003, alleging instances of forcible rape, coerced sexual activity, oral and anal sodomy, and pregnancies. They further allege that unless a woman prisoner has physical proof of sexual abuse by an officer, her complaint of abuse will result in *no* action taken against that officer by DOCS, and that DOCS allows a given officer to continue to guard women prisoners, even alone at night in a housing area, despite the fact that DOCS has received multiple credible complaints of sexual abuse by that officer. These women also allege that as a result, women continue to be sexually abused by line officers, and continue to be placed at an unreasonable risk of sexual abuse by known, dangerous line correctional staff.

All of these women reasonably believed they had complained about their assault sufficiently to bring a lawsuit and seek redress. All of them complained about their assault to DOCS Office of the Inspector General's Sex Crimes Unit (IG-SCU), an office established by DOCS for the very purpose of investigating complaints of sexual abuse, presumably because DOCS itself has recognized that complaints of staff sexual misconduct pose a unique set of concerns. These women's complaints to the IG-SCU were made consistently with DOCS'

written instructions telling all women entering the prison system that if they are sexually assaulted they may complain to the IG-SCU or to any staff to whom they feel comfortable speaking. Many of these women additionally complained to the officer's supervisor, to the deputy superintendent for security, or to the superintendent of the facility. Each of these women were told that such complaints, regardless of how they were filed, would be forwarded to the IG-SCU for investigation. Complaints conveyed to the IG-SCU clearly satisfied the purpose of the PLRA in that they gave correction officials notice of the complaint and the opportunity to address it.

The reasonableness of these women's belief that the IG-SCU is the appropriate venue for complaint is underscored by the experience of three of the women who did file grievances. These women—who happened to have timely access to counsel, who advised them to file grievances about their sexual assaults and appeal them to DOCS Central Office—had their grievances denied, or simply not decided, because the matter was the subject of an IG-SCU investigation, consistently with the customary practice of the prison system. That being the case, no reasonable person would appeal these decisions unless told to do so—as these women were—by an attorney schooled in the Byzantine requirements of the PLRA.

In complaining about their assaults, these women had already overcome significant obstacles. Most incarcerated women have a history of sexual or physical trauma prior to their incarceration, in some cases resulting in a diagnosis of post-traumatic stress disorder. *See* Angela Browne, Brenda Miller, & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women,* 22 INT'L J. LAW & PSYCH. 301-22 (1999). They are then the victims of assault by a staff member, triggering further trauma. This degrading experience is exacerbated by the prison environment in which, unlike their abuser, they lack any

authority and their reports are not credited. They also lack access to support systems available to victims outside of prison and, unless they come forward, they often must confront the abuser day after day. Because the abuser could face criminal penalties, a woman complaining of staff sexual abuse is at a great risk of retaliation for reporting; retaliation by the abuser, other officers, or even other inmates. A woman who is brave enough to complain additionally faces the likelihood that she will not be believed, absent physical proof of the assault, and the likelihood that she may be put into isolation as a result, "for her own protection." Despite these formidable barriers, all sixteen women who are plaintiffs in *Amador* did complain about their abuse to the IG.

Despite the efforts of these women to exhaust their administrative remedies under the PLRA, the federal District Court has ruled that *none* of these women sufficiently exhausted their administrative remedies to challenge DOCS' policies and procedures. *Amador v. Andrews*, 2007 WL 4326747 (S.D.N.Y., Dec. 4, 2007). In particular, the District Court disregarded the undisputed evidence that DOCS tells women they can complain to the IG-SCU, that no DOCS staff ever told them to file a grievance about the matter, and that DOCS takes no action on grievances about sexual abuse, except to say they are being investigated by the IG-SCU. Rather, the District Court found that under the PLRA, these women who had complained to the IG-SCU, but had not filed grievances, had not exhausted their available remedies and so could not pursue claims for injunctive relief or for money damages arising from their assault.[1]

[1] The court subsequently issued an opinion on plaintiffs' motion for reconsideration which is not yet published. It reinstates the damages claims of five plaintiffs, three of whom were not subject to the PLRA because they had been released before they filed suit, and two of whom had filed grievances. None of these women, however, were allowed to pursue their injunctive claims, which means that if this court's ruling stands, there will be no challenge to the continuation of the practices and omissions that made the abuse of these women possible.

There is one plaintiff who is still incarcerated and who filed and appealed a grievance which stated that she was raped by a particular officer who had been the subject of prior similar complaints to the Department, and that her rape should not have been allowed to happen. Nonetheless, the District Court found that this grievance was insufficient under the PLRA to exhaust a claim for injunctive relief. It held that the woman had not named the defendants (apart from the officer) she thought responsible for her assault, or described how they were responsible for her assault, and therefore could not pursue an injunction seeking policy changes to prevent future abuse either of her or of other women in the same situation. Of course prisoners are not privy to the personnel, supervisory, and disciplinary policies and procedures of the prisons in which they are held. Thus, under this decision, the PLRA requires that traumatized, often uneducated and un-counseled victims ignore misleading Departmental practices telling them to complain to the IG-SCU, and that they effectively frame a complex legal claim within the grievance directive's three week time frame, based upon information they have no ability or reason to know, or be denied access to the courts. The PLRA, as applied in this case, has effectively immunized DOCS from any challenge to prison procedures and practices regarding staff sexual abuse.

The PLRA's legislative history reveals it was not intended to bar meritorious lawsuits.[2] We believe that the *Amador* decision is an extreme application of the statute, and we will seek appellate review as quickly as possible. But success is not assured, and under the "proper exhaustion" standard adopted by the Supreme Court,[3] which penalizes prisoners' technical errors

[2] *See, e.g.,* 141 Cong Rec S 14611, *S14628 (Sen. Thurmond) ("This amendment will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.") (discussing amendment corresponding to PLRA as enacted; *see* 141 Cong Rec S 14611, *H14626).
[3] *See Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2386-88 (2006).

in the administrative process by requiring dismissal of their claims,[4] it is likely that in the future other courts will reach decisions as appalling as that reached by this court in *Amador*. In *Amador*, the PLRA has deprived a whole class of the most vulnerable citizens of any meaningful access to the courts and thereby has deprived them of any ability to protect their constitutional rights and their safety against the vilest sort of exploitation. The PLRA must be amended to prevent such results in the future.

Respectfully submitted,

S/

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[4] Dismissal under the PLRA is usually without prejudice. *See, e.g., Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003), *cert. denied*, 543 U.S. 925 (2004). As a practical matter, however, dismissal will almost always be final, because the deadlines of prison grievance systems are so short that the prisoner will be unable to exhaust to correct technical errors. *See Woodford v. Ngo*, 126 S.Ct. 2378 at 2389 (noting that such deadlines are typically 14 to 30 days); *id.* at 2403 (dissenting opinion) (citing a 48-hour time limit in a juvenile prison).

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Testimony Regarding H.R. 4109

We are grateful for the opportunity to share our experiences representing incarcerated clients as law student interns in the Jerome N. Frank Legal Services Organization ("LSO") of the Yale Law School. LSO provides free representation to indigent people in need of legal aid. Since 1970, LSO students have provided legal assistance to incarcerated people.

One of our organization's recent projects was to conduct a 50-state survey of the administrative exhaustion rules established in different correctional systems. (This survey formed the basis of an amicus brief we filed in the United States Supreme Court case *Woodford v. Ngo.*) Our study found that many prison systems have created unnecessarily complicated exhaustion procedures which impose exacting burdens on the inmates who are most vulnerable: juveniles, first-time offenders, victims of sexual assault, the disabled, the illiterate or marginally literate, those who do not speak English and those who fear retaliation or further abuse. These grievance procedures contain filing deadlines that are often impossible to meet and establish multiple levels of appeal and review whose chief effect is to avoid rather than to address an inmate's needs. As the Department of Justice determined after investigating the case of a juvenile inmate who suffered repeated beatings that rendered him unable to meet the 48-hour filing deadline at his facility, such procedures can be so "dysfunctional" as to "contribute[] to [a] State's failure to ensure a reasonably safe environment" for the inmates in its custody.[1]

Our organization's research into exhaustion procedures nationwide is confirmed by our own personal experience helping disabled prisoners navigate the Connecticut Department of Correction's ("DOC") grievance process. That experience has illustrated for us the ways in which the PLRA exhaustion requirement imposes unique burdens on vulnerable inmates. The basic problem that we repeatedly observe is that while the PLRA requires incarcerated individuals to follow their prisons' administrative exhaustion rules, the PLRA imposes no standards that define what those rules should look like. In Connecticut, the rules are sufficiently complicated that we, our supervising attorneys, and the prison officials we interact with all have difficulty applying them. The rules are especially complicated for disabled inmates seeking accommodation under the Americans with Disabilities Act ("ADA"), most of whom do not have the benefit of professional legal representation. For inmates like these, the PLRA has not lived up to its stated goal of weeding out frivolous lawsuits while allowing inmates with meritorious

[1] Letter of Bradley J. Scholzman, Acting Assistant Attorney General, to Mitch Daniels 7 (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf

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claims to have their day in court. Instead, the PLRA's administrative exhaustion requirement does the opposite. It rewards only those inmates who are able to make their way through the complex administrative maze—irrespective of the merits of their claims—while preventing some of the inmates with the most serious grievances from ever completing the process.

A quick overview of Connecticut's grievance process indicates how difficult it is for disabled inmates to navigate. The administrative directives outlining the process contain contradictions and ambiguities at almost every juncture. At times, the plain language of the directives is ambiguous enough that it seems literally impossible for anyone to be certain of the exact procedure an inmate must follow in order to fully exhaust his or her claim. For example, it is not clear how disabled inmates are supposed to initiate a request for reasonable accommodations pursuant to the Americans with Disabilities Act ("ADA"). The directives never state whether several important steps in the process—for instance, a meeting between the inmate and the ADA Coordinator responsible for an inmate's facility—are mandatory or not. Furthermore, the directives fail to specify when inmates should use the DOC's ADA reasonable accommodations process, governed by one directive, and when they should use DOC's health services review process, a quite different set of steps governed by a different directive. Thus, a deaf prisoner seeking a proper hearing aid may be redirected by DOC staff out of the ADA process and into the medical grievance process, resulting in redundant and parallel claims. Meanwhile, the directives are entirely silent as to what disabled inmates should do if DOC officials fail, as often occurs, to respond to the inmates' initial requests. In practice, then, while the PLRA requires that inmates complete every step of the administrative grievance process, it is often unclear even on the face of the governing regulations what that grievance process actually requires.

Even prisoners without disabilities have difficulty complying with DOC's general grievance rules. Illiteracy and poor literacy pervade the broader prison population, creating significant obstacles to complying with complex administrative requirements. The U.S. Dept. of Justice has found that forty percent of state prison inmates, twenty-seven percent of federal inmates, and forty-seven percent of inmates in local jails have failed to complete high school or its equivalent, compared with only about eighteen percent of the general population.[2] In addition, seven out of ten inmates operate at the lowest two levels of literacy on a five-level scale.[3]

Making matters worse for inmates with disabilities, the DOC's ADA grievance process makes no allowance for the unique obstacles these individuals face. Let's suppose that Connecticut's DOC follows its own directives (which does not always happen, in our experience) and convenes a meeting with an inmate to discuss his or her disability-related complaint. Sadly, deaf inmates sometimes find that they are not provided with sign language interpreters at this stage of the process. How is a deaf inmate supposed to resolve problems related to his communications needs when he is not even able to communicate those needs to the prison officials at the meeting?

[2] CAROLINE WOLF HARLAW, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 2 (Jan. 2003).

[3] U.S. DEPT. OF EDUCATION OFFICE OF EDUCATION AND RESEARCH, LITERACY BEHIND PRISON WALLS: PROFILES OF THE ADULT PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xviii (1994).

Blind inmates also face disadvantages. As far as we know, the grievance forms are not provided in Braille, nor are the lengthy administrative directives that describe the grievance process available in Braille. How is a blind inmate supposed to become aware of the requirements imposed by the administrative grievance process, much less actually fill out a grievance?

This confusion is compounded by the fact that inmates are rarely told the identity of the ADA Coordinator responsible for their facility, even though the governing administrative directive requires the DOC to make that information available to all inmates in Connecticut facilities.

As a legal clinic, it is our job to interpret these complicated administrative directives. But even we don't always understand what they mean. Well-meaning prisoners who want to follow the rules, and well-meaning prison officials who also want to follow the rules, are often impeded from doing so by the confusing nature of the rules themselves.

We conclude with a description of the experience of one of our clients. This client's experience demonstrates that the PLRA's exhaustion requirement has not achieved its intended goal of reducing the need for litigation by helping inmates resolve their claims through administrative procedures. This client uses a hearing aid which, over time, often requires repairs or replacement. Before the PLRA exhaustion system was put in place, our client was able to obtain the assistance he requires through informal requests to prison officials. In the past year, our client's hearing aid has again begun malfunctioning, but he has received no response to his requests for a replacement submitted through the formal administrative process required by the PLRA. As a result, a complaint that previously would have been handled without involving the courts may now require litigation.

Our client's experience speaks to a fundamental problem with the PLRA's exhaustion requirement. By forcing both inmates and prison officials to focus on confusing procedural rules, the PLRA tends to prevent those officials from addressing the substance of inmates' concerns. In so doing, the PRLA's exhaustion requirement defeats the PLRA's own aims, increasing the need for inmates to resort to litigation to resolve simple problems, while at the same time preventing the most legitimate claims from being heard by courts.

Rachel Osterman and Michael Farry
Law Student Interns

MINNESOTA DISABILITY LAW CENTER

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Testimony in Support of H.R. 4109 – Prison Abuse Remedies Act of 2007

The Minnesota Disability Law Center (MDLC) is a statewide project of the Legal Aid Society of Minneapolis which is designated as the federally mandated Protection and Advocacy system for Minnesotans with disabilities. MDLC provides free civil legal assistance to individuals with disabilities, including people with disabilities who are in jails and prisons.

I. Current Case Examples Support the Need for H.R. 4109

From our experiences with incarcerated people with disabilities, we know that prisons and jails across Minnesota often fail to meet the needs of prisoners with disabilities. Our clients experience treatment that may constitute violations of civil rights laws and pose a threat to their health and safety. A few examples of our clients' stories from the past 12 months include:

- A partially paralyzed wheelchair user was incarcerated at a county jail. The staff's failure to provide adequate medical care led to his not receiving access to basic sanitation, such as regular showers. Without access to services that would facilitate his toileting needs, the man experienced incontinence. The jail responded to the incontinence by punishing the prisoner, placing him in seclusion for up to a week at a time. When MDLC staff tried to visit the prisoner, the jail initially blocked access to him and refused to allow MDLC staff to enter the facility.
- A hard-of-hearing prisoner in a state prison does not have two functioning hearing aids after requesting them in writing more than 14 times over a 16-month period. Although the man has worn two hearing aids for bilateral hearing loss for almost his entire life, the correctional facility has asserted that one hearing aid is adequate. Using only one hearing aid may worsen the prisoner's existing hearing ability.
- At least three deaf individuals spent time in a county jail without anyone explaining the charges against them or jail procedures in a language they could understand. All three were unable to contact family or an attorney because the jail did not offer an alternative to the telephone, despite the individuals' repeated requests for one. Without access to people outside the jail, the individuals could not make bail and stayed incarcerated far longer than necessary. Two were never charged with a crime.

- A mobility-impaired prisoner has been unable to access a prison's programs and services—including the library—because the prison refuses to provide him with a wheelchair or other assistive equipment to navigate the stairs leading to the library's door.
- A deaf individual waited more than 12 hours after his arrival to be booked in a county jail. Booking occurred only after jail staff convinced the individual's family member to interpret for them. While the family member felt deeply uncomfortable doing so, she was anxious to prevent her loved one from further delay in his processing.

II. H.R. 4109 Would Allow Prisoners with Disabilities to Pursue Legitimate Claims

Two provisions of the Prison Litigation Reform Act (PLRA)—the exhaustion requirement and the physical injury requirement—have an especially dampening effect on legitimate claims for corrective action by prisoners with disabilities in Minnesota. The Prison Abuse Remedies Act would go a long way toward protecting the rights of prisoners with disabilities to receive crucial medical treatment as well as equal access to prison programs and services.

A. Present Administrative Exhaustion Requirements Create Barriers for Prisoners with Disabilities

Often, people with disabilities—particularly those who are deaf and communicate in American Sign Language; people with traumatic brain injury; and those with development and mental disabilities—experience barriers to communicating with correctional staff through traditional channels. They are even less able than prisoners without disabilities to follow complex and lengthy administrative procedures that are a prerequisite to filing suit under the PLRA. 42 U.S.C. § 1997e (a). Their disabilities often leave them particularly vulnerable to civil rights abuses, and yet particularly hindered in their ability to seek judicial redress.

In our experiences, prisoners with disabilities do attempt to resolve their grievances informally prior to considering legal action. However, as in the case examples above, often their repeated requests to access prison services and activities and to receive the medical care they need go unheeded or are denied. In such circumstances, they must navigate an opaque administrative grievance procedure. Compounding the complexity, the procedure for disability-related complaints is distinct from that addressing all other complaints, although often the issues are related.

Prior to passage of the PLRA, prisoners with disabilities who were forced to sue when administrative grievances failed could gain redress from the courts. For example, in *Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir.1980), the Court of Appeals found that a correctional facility in our circuit had imposed "cruel and unusual punishment" upon a prisoner, in violation of the Eighth Amendment, when the prisoner alleged that correctional staff denied him the use of his wheelchair after he complained about medical treatment. The prisoner was forced to crawl around on the floor of his cell. But had that prisoner attempted to bring suit today, his case may

well have been dismissed for failure to comply with the PLRA. *See, e.g., Rivera v. Prince*, No. 2:07CV00079 JLH/JTR, 2008 WL 687376, at *2 (E.D.Ark. March 11, 2008) (dismissing prisoner's claims that correctional staff's inadequate medical care led to blindness because, although the prisoner submitted many grievances at several levels on the chain of command, he did not exhaust his administrative remedies "properly").

Section 3 of the Prison Abuse Remedies Act provides a fair balance between judicial efficiency and the rights of prisoners, particularly those with disabilities for whom the exhaustion requirement poses a prohibitive burden to corrective action.

B. The Present Physical Injury Requirement Excludes Many Valid Claims of Serious Rights Violations

For those few prisoners with disabilities who do file suit and successfully navigate through their prison's administrative grievance procedure, the PLRA further restricts the remedies available to them in court by requiring a showing of physical injury before they can recover damages for emotional or psychological harm. 42 U.S.C. § 1997e(e).

Many egregious injuries sustained by prisoners with disabilities do not result in physical injuries. For example, in *Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004), the Eighth Circuit Court of Appeals considered the case of a prisoner whose spinal cord injuries required him to use a wheelchair for mobility. This prisoner alleged serious medical neglect. His complaint included the following allegations:

> 1) he could not turn his wheelchair in his cell; 2) he was unable to get to the toilet or shower; 3) he had blood in his catheter, but no action was taken by medical staff because he did not have an elevated temperature; 4) he was transferred in a van that was not handicapped accessible, requiring him to fall to the floor before pulling himself onto the van's seat; 5) he had to fall on the ground and pull himself up onto a shower chair in order to shower; 6) he had to lay on the floor after using the toilet to pull on his prison-issue jumpsuit, and his request to wear pants instead of a jumpsuit was denied; and 7) his requests for an enema were delayed--once for ten days and once for six days.

Id. at 726 (Heaney, J., dissenting). When the prisoner filed suit and complained about the facility's treatment, correctional staff took away his wheelchair and—like our client who experienced incontinence because of the jail's failure to adequately accommodate his toileting needs— placed him in segregation. A district court found that the prison violated his constitutional rights. *Id.* at 722. Yet the appellate court sustained a judgment awarding the prisoner $1.00 in nominal damages and $1.50 in attorneys' fees, the maximum it believed was permitted under the PLRA because the prisoner had no physical injury. *Id.* at 726.

In sum, the PLRA's physical injury requirement not only severely limits a court's ability to offer just compensation to a truly aggrieved prisoner, it also offers little incentive to prisons and jails to treat prisoners with disabilities with dignity. Section 2 of the Prison Abuse Remedies Act would eliminate this harmful provision.

III. Conclusion

In light of the foregoing, we encourage Congress to adopt the Prison Abuse Remedies Act in its entirety, to prevent continuing abuses and neglect of prisoners with disabilities.

CENTER FOR Children's Law and Policy

**Testimony of the Center for Children's Law and Policy
for the House Judiciary Subcommittee
on Crime, Terrorism and Homeland Security**

April 22, 2008

Mark Soler, Executive Director
Dana Shoenberg, Senior Staff Attorney

The Center for Children's Law and Policy (CCLP), a nonprofit public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems, submits this testimony to supplement previous testimony submitted to the Subcommittee on November 8, 2007. CCLP supports the provisions of H.R. 4109, the "Prison Abuse Remedies Act of 2007," and urges the Subcommittee to approve the bill or similar legislation that protects children from the provisions of the Prison Litigation Reform Act (PLRA) by removing juveniles from the Act.

We have extensive experience in the area of juvenile justice, particularly with respect to investigation of and litigation over conditions of confinement for juveniles. Mark Soler litigated such cases throughout the country over the past 30 years and has authored more than 20 articles and book chapters on civil rights, the rights of children, and juvenile justice issues. Before joining CCLP, Dana Shoenberg served from 1998 to 2005 as a Trial Attorney and then Senior Trial Attorney in the U.S. Department of

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Justice, Civil Rights Division, Special Litigation Section, where she investigated and sought remedies for patterns and practices of constitutional and other federal law violations in state and local juvenile detention facilities, jails, and prisons. We have interviewed many hundreds of incarcerated youth over the years, as well as large numbers of facility staff and administrators. We were two of the principle authors of the comprehensive standards for inspection of juvenile detention facilities promulgated by the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative.

No "Release Orders" Involving Dangerous Juvenile Offenders. In the course of our work on conditions of confinement, we monitor civil rights litigation in this area, review reports on litigation, and have contact with attorneys in the country who bring civil rights class actions over conditions in juvenile facilities. We are not aware of any litigation that has resulted in the release of dangerous juvenile offenders as a consequence of population caps. In fact, there have been few cases involving juvenile facilities that have led to court-imposed population caps. In the instances in which courts have imposed population caps in juvenile facilities, the policy and practice have been to release youth who pose the least risk to public safety. This principle is often explicitly included in the terms of the court order or consent decree. In the course of our technical assistance to juvenile justice systems around the country, we have helped jurisdictions create structured tools to help decision-makers apply uniform criteria to decide which youth are appropriate to detain and which can safely be released.

Extensive Abuse of Children in Juvenile and Adult Facilities. Mark Soler's testimony for the Subcommittee on November 8, 2007, discussed the extensive abuse in juvenile facilities reported in recent years. In addition to examples cited there from

Texas, South Dakota, Ohio, Montana, Florida, Maryland, Tennessee, New York, Illinois, Louisiana, and Mississippi, the Subcommittee should be aware of the following from California:

- In 2005, a group of incarcerated youth sued the State of California for inadequate supervision, overcrowding, and unsanitary conditions for 10,800 youth confined in state juvenile facilities. In addition, there were also 218 reports of abuse and 60 allegations of sexual abuse reported to the Department of Corrections and Rehabilitation in the years 2005-2007.[1] In the three years that California has had to remedy the situation, plaintiffs' lawyers say that California's Division of Juvenile Justice has made "a mockery of compliance" in the areas of education, safety, medical care, mental health, disabilities, and sex offender treatment. Staff reportedly keep youth on suicide watch without supervision, and discipline youth by confining them in dark and filthy cells for 20 hours a day. The state has yet to establish an adequate mental health treatment program, and access to medical treatment has been slowed due to tensions between correctional and medical personnel.[2]

- In 2003, the U.S. Department of Justice found that the Los Angeles County Juvenile Halls (detention facilities) provided inadequate mental health services to detained youth, leading to increased safety and suicide risks. The Department of Justice also found that staff at the Los Angeles facilities used pepper spray excessively to control youth, often using the painful spray without proper warning. Staff also used pepper spray on youth who were already under control or who had committed minor infractions. Staff sprayed one youth after placing her in handcuffs because she was threatening to harm herself. Staff sprayed other youth for talking back to staff members. The Department of Justice found that there were no effective administrative remedies available: all facilities lacked effective grievance systems. Many youth feared retaliation by staff members and were aware that their grievances would not remain confidential. Moreover, there was no system in place to ensure that any remedy would take place after a youth filed a grievance.[3]

Children face even worse dangers in adult jails and prisons. More than 25 years ago, Mark Soler testified before the Senate Judiciary Committee's Subcommittee on Juvenile Justice on the incarceration of children in adult jails and lock-ups.[4] The testimony described a 15-year-old girl who was held in jail in Ohio for running away from home, then sexually assaulted by a guard; a 17-year-old boy who was jailed in Idaho for traffic violations and then beaten to death by other inmates; and a 16-year-old

boy in Kentucky who was put in jail after having an argument with his mother, then committed suicide by tying one sleeve of his shirt around his neck and the other to the bars of his cell, and jumping from the top of the shower stall.

The Department of Justice has found dangers to youth held in adult jails as well. In a 2002 findings letter, for example, the Department found that in the Baltimore City Detention Center, where girls were not sight and sound separated from adult women, adult female inmates frequently shouted sexually harassing and frightening comments at them. The Department also found that the facility placed youth at risk of harm by failing to separate youth and adults in preparation for and during transportation.[5]

Today, the dangers to youth in adult jails and prisons -- assaults, depression, lack of mental health services, lack of education, and suicide -- are well-documented.[6] According to the U.S. Department of Justice, Bureau of Justice Statistics, a very high percentage of the victims of inmate-on-inmate sexual violence in adult jails – 21% in 2005 and 13% in 2006 -- were youth under the age of 18[7], at a time when only 1% of the inmates in jails are under 18.[8] Moreover, juveniles in jails are 36 times as likely to commit suicide as juveniles in juvenile detention facilities, and 19 times as likely to commit suicide as juveniles in the general population.[9]

No Frivolous Lawsuits Filed by Youth. We are not aware of any lawsuits over conditions of juvenile confinement that have been dismissed by the court as "frivolous." That is hardly surprising. In a locked juvenile facility, jail, or prison, staff mete out discipline for misbehavior, and young people are dependent upon staff for food, clothing, exercise, education, and access to medical and mental health services. Consequently, most youth are reluctant to complain for any reason, no matter how badly they are

mistreated, let alone file a lawsuit. Lack of knowledge about their rights, as well as pervasive fear of retaliation by staff, keep young people quiet. Moreover, the often complex grievance systems in correctional facilities deter youth from all but the most pressing and legitimate concerns. Most incarcerated teenagers lack the writing ability and understanding of the court system needed to file a court action, and their access to attorneys willing and able to bring such actions is extremely limited as well.

For these reasons, as well as those noted in earlier testimony, we urge the Subcommittee to act favorably on H.R. 4109.

[1] Mohr, Holbrook. "Youth Prisons Get Scrutiny." AP. 3 Mar. 2008. 7 Mar 2008. http://www.mercurynews.com/crime/ci_8435681

[2] Rothfeld, Michael. "Juvenile Prison System Needs Reform Lawyers Say." Los Angeles Times. 18 Feb. 2008. 7 Mar. 2008. http://www.latimes.com/news/local/la-me-youth18feb18,0,5845357.story.

[3] Boyd, Ralph. Investigative Findings Letter. U.S. Department of Justice: Civil Rights Division. (April 9, 2003). http://www.usdoj.gov/crt/split/documents/la_county_juvenile_findlet.pdf.

[4] Reauthorization of the Juvenile Justice and Delinquency Prevention Act, S-Hrg. 98-330, 98th Cong. (Feb. 24, 1983) 6-25 (Statement of Mark Soler, Executive Director, Youth Law Center).

[5] Boyd, Ralph. Investigative Findings Letter. U.S. Department of Justice: Civil Rights Division. (August 13, 2002). http://www.usdoj.gov/crt/split/documents/baltimore_findings_let.htm.

[6] Campaign for Youth Justice, The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform (March, 2007).

[7] Beck, A.J., Harrison, P.M., Adams, D.B. (2007, August). Sexual Violence Reported by Correctional Authorities, 2006. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics; Beck, A.J., Harrison, P.M., Adams, D.B. (2006, July). Sexual Violence Reported by Correctional Authorities, 2005. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

[8] Snyder, H.N., Sickmund, M. (2006). Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

[9] Campaign for Youth Justice, Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America (November, 2007).

Supplemental Testimony of Juvenile Law Center
for the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security
April 22, 2008

Prepared by Robert G. Schwartz, Executive Director, Juvenile Law Center

Juvenile Law Center works to ensure that the child welfare, juvenile justice and other public systems provide vulnerable children with the protection and services they need to become happy, healthy and productive adults. This testimony supplements Jessica Feierman's November 8, 2007 submission on behalf of Juvenile Law Center, Youth Law Center, National Center for Youth Law, and Center for Children's Law and Policy.

At Juvenile Law Center, where I have been since 1975, we have used many strategies to improve conditions for foster youth, for youth with mental health problems, for youth with education needs and for those who have been harmed by the juvenile justice system. Litigation, which we have used sparingly, has been one of the tools available to us from the time we opened our doors. We have found that even the threat of litigation can reduce harm to children and youth, regardless of the system that has custody of them.

When the state takes children into custody, it should protect them. It should do a lot more, of course—it should prepare youths for lives as citizens—but at a minimum it owes a duty of protection. The PLRA removes one important vehicle that lawyers for children and youth can use to ensure that the state protects vulnerable children from harm. We urge you to protect these children by removing them from the Act.

Our earlier testimony addressed our key points. I would like to make some additional observations.

First, although the PLRA was enacted in part to prevent frivolous prisoner litigation, in over 30 years of working locally, nationally and internationally on juvenile law, I have never heard of a frivolous law suit brought by a confined youth. Our earlier testimony made this point, but it is worth emphasizing. Juveniles are different.

Second, the greater the harm, the more far-fetched it is to expect juveniles to exhaust administrative remedies. Recent abuses in the Texas system suggest why. The

abusers—administrators and staff—are the people who would process the grievances. Juveniles have enormous deference to authority, and they also fear authority figures, especially those who have already harmed them in some way. Research of the MacArthur Foundation Research Network on Adolescent Development, in its landmark 2003 study of juvenile competence, noted deference to authority as one of several important ways in which juveniles differ from adults. See "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants," Grisso, et al. (Law and Human Behavior, Vol. 27, No. 4, August 2003).

Juvenile Law Center's experience reinforces this point. One of our cases in the early 1990s involved horrible conditions at a state training school. Several administrators had recruited older youth to maintain order—those youths beat other youths and received privileges for their efforts. If the victims had to "exhaust" remedies first, they would have had their complaints known not only by the administrators who arranged for them to be "controlled," but by the administrators' henchmen: the youths in the facility who were part of the problem. Litigation was a safe way to address the problem after other approaches proved futile.

Third, the PLRA limits attorney's fees, arguably because public officials worry that plaintiffs' attorneys will build exorbitant bills at taxpayers' expense. While institutional conditions litigation can be expensive, it is often public officials who increase costs. We have found, in public litigation, that outside counsel often represent public officials. They are in a position to delay proceedings and run up costs. The provisions of the PLRA that require, essentially, a new trial as to constitutionality of conditions create enormous new litigation costs for everyone. Prior to enactment of those settlement and consent decree provisions, it was much easier for counsel to sit down, discuss problems, and fashion new relief. The solution to excessive billing—as in the area of "frivolous" lawsuits—is strong judicial oversight. In our experience, federal judges have no difficulty slashing excessive claims for attorney's fees. In fact, most of our fees in institutional litigation were negotiated, with defendants finding our claims quite reasonable.

PLRA's backers sometimes refer to overcrowding litigation and cite a Philadelphia Youth Study Center (secure juvenile detention center) tragedy from the late

1980s to support their argument that federal court oversight caused a fatality. There was a tragedy at that time. As I recall, a 12-year-old boy who was moved from the Youth Study Center to a community program, fled, stole a car, and while driving got into a fatal auto accident. It is quite a stretch, however, to attribute the tragedy to the power of the federal court to approve a settlement, or to imply that the single example was part of a larger problem.

The settlement in that case was designed to ensure that Philadelphia detained the highest risk arrestees. It prohibited detention of youth who were charged with minor offenses or technical probation violations, or who were so seriously mentally ill that they were committable under Pennsylvania's mental health laws. It also prohibited detention of youth who were under the age of 13.

Of course, the 12-year-old should have been better supervised—he was supposed to be in one of hundreds of staff secure beds created to address overcrowding—but he fled. It is unseemly to attribute a horrible outcome to the federal court settlement. Indeed the specific policy at issue - prohibiting detention for youth aged 12 and under - is in place in many jurisdictions around the country today. The incident did not happen because of the court's authority over settlement agreements, but because even correct decisions sometimes turn out badly. That can happen when a risk-management plan carefully devised by all stakeholders doesn't work for a particular youth. Such failures can happen at every stage of every system in which people make decisions that involve risk. (I would add that, although it was never part of the settlement, prosecutors in Philadelphia are routinely involved in *every* step down hearing to decide detained youths' level of risk and whether an alternative to the Youth Study Center can safely manage the risk.) In the world of corrections, decisions about who to place in secure detention - and the risks that ensue - will always be necessary, whether or not there is a PRLA.

At the end of the day, there are times when federal court oversight is necessary to ensure that children aren't brutalized. In juvenile detention facilities, populations can rise or fall rapidly, depending on whether there are delays in bringing cases to trial, or a shortage of beds for sentenced youth (so that they have to wait in detention awaiting an opening), or a shortage of judges. The reasons are many. Several times in the early 1990s, the Youth Study Center population went to 200 percent of capacity. When we as

plaintiffs' counsel were unable to negotiate relief with the city, so that youths wouldn't have to sleep on floors, and so youth and institution staff could be safe, we would return to federal court. If the PLRA had applied to our work at that time, we would have had to bring an entirely new federal law suit every time that happened. Youths would be left in brutal conditions while lawyers spent the next couple of years relitigating constitutional issues. In the pre-PLRA world in which we operated, we could return to court, get quick relief, work with the city and its courts to solve the problem. In short, we could save kids, protect staff, and save dollars.

The PLRA permits institutionalized child abuse, without advancing public policy or public safety. As we noted in our earlier testimony, applying the PLRA to juveniles serves neither the goals of the Act nor the welfare of our country's children for a number of reasons: (1) children's conditions cases are extremely rare, regardless of the PLRA; (2) federal court procedures and judicial oversight protect the courts from frivolous litigation by incarcerated youth without the need for including them in the PLRA; (3) the unique characteristics of incarcerated youth mean that many of the PLRA's provisions serve as a complete bar to court; (4) the PLRA undermines the rehabilitation at the core of the juvenile justice system; and (5) applying the PLRA to children reduces public safety.

We urge you, once again, to protect vulnerable children, and remove them from the Act.

H.R. 4109
"The Prison Abuse Remedies Act of 2007"
(Proposing to Amend the Prison Litigation Reform Act)

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H.R. 4109
Proposed Amendments to the Prison Litigation Reform Act

I. INTRODUCTION

H.R. 4109 proposes substantial amendments to the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134. (The status of this bill is discussed later in Section III, p.5.) The PLRA was passed in 1996 to address concerns about prisoner litigation. The PLRA provisions amended and supplemented various titles of the United States Code. Its provisions address two major categories of prison litigation: (1) institutional class action litigation; and (2) *pro se* lawsuits filed by prisoners. The amendments proposed by H.R. 4109 would substantially amend the PLRA provisions for both categories.

II. THE PRISON LITIGATION REFORM ACT

In the 1990s, the National Association of Attorneys General (NAAG) and the National District Attorneys Association (NDAA) strongly urged Congress to address substantial problems with prison litigation. NAAG estimated that frivolous inmate lawsuits cost more than $80 million each year. Taxpayers footed the hefty bill for corrections lawyers (to defend these lawsuits), prison staff (to gather information to respond to the suits and transport the offenders to the courthouse), court clerks (to process mountains of legal filings) and judges (to rule on the claims). At the same time, the NDAA was especially concerned about Federal court injunctions and consent decrees that were requiring the release of inmates or consuming substantial criminal justice resources.

Based on these concerns, Congress passed the PLRA in 1996 with strong bipartisan support and the support of the Clinton Administration.[1] The PLRA was later amended in 1997.[2] Together, these two laws form what is known as the PLRA.

[1] The PLRA began as various bills in the House and Senate. In the House, the provisions regulating prospective relief in prison conditions litigation first appeared in H.R. 554, 104 Cong. (1995), which was introduced by Congressman Canady on January 18, 1995, and referred to the Subcommittee on Crime of the House Judiciary Committee. The Chairman of the Subcommittee on Crime of the House Judiciary Committee, Congressman McCollum, then included them as Title III of H.R. 667, 104 Cong. (1995) (Title III), a broader bill on various aspects of incarceration that he introduced on January 25, 1995. The House Committee on the Judiciary marked up H.R. 667 a week later and sent it to the floor with an accompanying report, House Report No. 104-21 on H.R. 667, 104 Cong., 1st Sess. (Feb. 6, 1995) (Violent Criminal Incarceration Act of 1995, Title III) (hereinafter "House Report 21"), which contains important commentary on the provisions that ultimately became Section 802 of PLRA. The House passed H.R. 667 on February 10, 1995, and sent it to the Senate.

In the Senate, S. 400, 104 Cong. (1995) introduced by Senator Hutchison on February 14, 1995, contains the same early version of the PLRA provisions on prospective relief as

H.R. 554 and H.R. 667. On July 27, 1995, shortly before the August recess, the Senate held a hearing on various proposals relating to prison reform, including S. 400 and H.R. 667, chaired by Judiciary Committee Chairman Hatch and Senator Abraham. On September 26, 1995, Senator Abraham introduced S. 1275, 104 Cong. (1995), co-sponsored by Senators Hatch, Specter, Kyl, and Hutchison. The core provisions are found in Section 2, which significantly modified prior versions of the prospective relief provisions. The following day, Majority Leader Dole introduced S. 1279, 104 Cong. (1995), cosponsored by Senator Hatch, Senator Abraham, the other Senate cosponsors of S. 1275, and additional Senators, including Senator Gramm, the Chairman of the Commerce-Justice-State Appropriations Subcommittee. S. 1279, 104 Cong. (1995) was a broader bill on incarceration (more similar in scope to H.R. 667). Section 2 of S. 1279 consisted of the prospective relief provisions contained in S. 1275, with a few additional modifications. On September 29, 1995, on the Senate floor, Senator Hatch then added the text of S. 1279 as an amendment to H.R. 2076, 104 Cong. (1995) the annual Commerce-Justice State appropriations bill, which had been reported to the floor by Senator Gramm's Subcommittee. See Cong. Rec. S14,756-14,759 (daily ed. Sept. 29, 1995). The Senate passed H.R. 2076 that same day and requested a conference with the House. The conference reported an agreed-upon version of the bill that retained the PLRA provisions added by the Senate with a few changes not relevant to this case. See H.R. Conf. Rep. No. 104-378, 104th Cong., 1st Sess. (Dec 1, 1995) at pp. 166-67 (discussing purposes of the PLRA). Both Houses of Congress approved the conference version of the bill, but the President vetoed it (with no reference to the PLRA provisions). See Veto Message, Cong. Rec. H15,166-15,167 (daily ed. Dec. 19, 1995). A later version of the Commerce-Justice-State appropriations bill, still containing the same PLRA provisions, was then included in a final omnibus appropriations bill negotiated with the White House that ultimately became law. See H.R. 104-537 (Conf. Rep. To Accompany HR 3019) 104th Cong., 2d Sess., pp. 69 et seq. (April 25, 1996); Cong. Rec. HR 1895-1898 (daily ed. March 7, 1996). House Report 104-537 provides that the controlling portions of H.R. No. 104-378 "remain controlling and are incorporated herein by reference."

[2] Following the enactment of the PLRA, Congress became aware of some problems with courts refusing to issue timely rulings on termination motions and attempts to expand the powers of judges to continue old consent decrees for long periods of time even where there were no current constitutional violations. The Senate Judiciary Committee was especially concerned about positions taken by the Department of Justice in legal filings and took the unusual step of holding a hearing to examine PLRA implementation problems and possible solutions. See Implementation of the Prison Litigation Reform Act: Hearings before the Senate and House Committees, 104 Cong. (1996). The 104th Congress adjourned *sine die* the following week, so no further legislative action was taken at that time. On the first day of the next session, Senator Hatch introduced S. 3, the Omnibus Crime Control Act of 1997. Title IX of this legislation was designed to clarify various provisions of the PLRA relating to the termination standard. Section 902(3) proposed two amendments to the automatic stay language. Congress took no action on S. 3 itself. However, Members in both houses on the Judiciary and Appropriations

Meritless Inmate Lawsuits. In response to concerns from state and local governments, the PLRA fashioned new rules to discourage inmates from filing lawsuits that were frivolous or unlikely to succeed. It imposed a partial filing fee system, which required inmates to pay full filing fees (usually through an installment plan); granted Federal judges greater discretion to dismiss lawsuits early in the litigation process; and established a "three-strikes" provision that barred multiple meritless filings. The PLRA, however, carefully protected legitimate claims and preserved the full power of the Federal courts to remedy constitutional violations. Since its passage in 1996, the PLRA has substantially reduced the number of meritless inmate lawsuits.

Institutional Litigation and Consent Decrees. The PLRA also addressed substantial complaints from state and local officials about the problem of never-ending consent decrees---court orders issued upon the consent of both parties---that unreasonably hampered correctional managers. In the 1970s and 1980s, many prison systems entered consent decrees believing that they would help improve prison conditions. These court agreements often settled difficult and potentially embarrassing lawsuits at seemingly minimal financial costs. Consent decrees also gave prison administrators leverage in the inevitable budget battles with other government agencies.[3]

Prison managers ultimately found that consent decrees impaired their ability to manage prisons. Consent decree provisions that seemed wise years earlier soon became outdated and counterproductive. Despite this, consent decrees were very difficult to change. Prison managers no longer could re-evaluate and revise policies when the old ones didn't work or when new information became available. Staff was disempowered, and their ingenuity and initiative were stifled. Courts, lawyers, and court-appointed special masters often had greater control than prison managers. Congress heard from

Committees obtained the inclusion of a modified version of the language of §902(3) of S. 3 in H.R. 2267, the FY 1998 Commerce-State-Justice Appropriations Conference Report. See Act of Nov. 26, 1997, Pub.L. No. 105-119, Title I, § 123(b), 111 Stat. 2471.

[3] For example, prison administrators could resist budget cuts because they might suffer large fines for any variety of consent decree violations. But many later learned that such agreements could be incompatible with government fiscal restraint efforts. When, for example, Philadelphia faced bankruptcy, City officials began prioritizing social work services, in the event that future layoffs became necessary. They prioritized prison social workers ahead of every other need---including the homeless, abused and neglected children, crime victims, and AIDS patients---simply because a consent decree mandated staffing levels. Later, a court fined Philadelphia $400,000 for violating that consent decree because social workers failed to respond to inmate requests within 72 hours. Mayor Edward Rendell's chief of staff publicly criticized the fine levied against the financially distressed city as being equivalent to "realigning the deck chairs" on the sinking Titanic.

numerous witnesses who complained about the adverse effects of these longstanding injunctions.[4]

Prison administrators found it virtually impossible to end these counter-productive decrees. The standards for decree modification and termination granted great discretion to Federal judges to retain jurisdiction, sometimes for decades.[5] Prison officials were required to demonstrate that the goals of the consent decree had been achieved. Many administrators became embroiled in difficult and costly litigation just to change minor provisions of consent decrees.

Prisoner Release Orders. A number of jurisdictions were especially concerned about Federal court orders requiring the release of prisoners due to overcrowding or otherwise unsafe conditions. Congress was especially concerned about Federal injunctions that released prisoners or otherwise adversely affected public safety. For example, Congress specifically considered the Philadelphia prison cap case when it established the new limits on prisoner release orders.[6]

[4] See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866 & H.R. 667 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (1995) at pp. 26-32 (testimony of William P. Barr, former Attorney General, United States Department of Justice); pp. 32-37 (testimony of Paul T. Cappuccio, former Associate Deputy Attorney General, United States Department of Justice); pp. 106-115 (testimony of O. Lane Cotter, Executive Director of the Department of Corrections for the State of Utah); pp. 37-45 (testimony of John J. Dilulio, Professor of Politics and Public Affairs, Princeton University); pp. 45-51(testimony of Lynne Abraham, District Attorney of Philadelphia); pp. 54-60 (testimony of Michael Gadola, Director, Office of Regulatory Reform, State of Michigan). See also pp. 51-52 (Resolution of December 3, 1994, National District Attorneys Association).

[5] At the time the PLRA was passed, thirty-nine state prison systems operated under some Federal court order or injunction. See Overhauling the Nation's Prisons: Hearings Before the Senate Judiciary Committee, 104 Cong. (1995) (statement of John J. DiIulio, Professor of Politics and Public Affairs at Princeton). Some of these orders had far-reaching operational and financial implications. Texas prisons, for example, could not exceed 95% of their design capacity. See Ruiz v. Estelle, 161 F.3d 814, 825-27 (5th Cir. 1998) (describing prison capacity limits contained in consent decrees that have the effect of requiring Texas to build more prisons); Alberti v. Klevenhagen, 46 F.3d 1347, 1352 (5th Cir. 1995) ("After years of litigation, in 1985, the State entered into a stipulation, requiring it to limit its prison population to ninety-five percent of capacity.") Given that Texas's prototypical prisons cost $46 million each to construct, the 95% population cap had huge financial implications.

[6] Congress cited to the Philadelphia prison cap case when it passed the prisoner release order provisions of the PLRA. While the litigation lasted for almost 20 years, the following description details the key concerns Congress considered.

III. STATUS OF H.R. 4109

Representative Robert C. "Bobby" Scott introduced H.R. 4109 ("The Prison Abuse Remedies Act of 2007") on November 7, 2007. The Chairman of the House Judiciary, John Conyers, cosponsored the bill. The next day, the Crime, Terrorism and Homeland Security Subcommittee, House Judiciary Committee, held a hearing titled "Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison Abuses?"[7] On December 12, 2007, H.R. 4109 was referred to the Crime, Terrorism and Homeland Security Subcommittee. Originally, the Subcommittee planned to hold hearings on the bill on February 12, 2008, but the hearing was cancelled as staff

In the 1980s, Philadelphia's mayor agreed to a consent decree to settle a class action lawsuit without a trial. He agreed to reduce the prison population by releasing "non-violent" offenders. Instead of individualized bail review, with Philadelphia judges considering a criminal defendant's dangerousness to others or his risk of flight, the Federal consent decree required a "charge-based" system of prison admissions. Suspects charged with so-called "non-violent" crimes---including stalking, car jacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terroristic threats, and gun charges---were not subject to pretrial detention.

Following the implementation of prisoner releases under the Federal court order, the number of fugitives in Philadelphia nearly tripled; outstanding bench warrants skyrocketed from 18,000 to 50,000. In one 18-month period (from January 1993 to June 1994), Philadelphia rearrested for new crimes 9,732 defendants released by the Federal court order. These crimes included 79 murders, 959 robberies, 2215 drug dealing cases, 701 burglaries, 2,748 thefts, 90 rapes, 14 kidnappings, 1,113 assaults, 264 gun crimes, and 127 drunk driving cases. When the new mayor (Edward Rendell) took office, he immediately attempted to terminate the consent decree. He was unable to do so until the PLRA established procedures for terminating old consent decrees. See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866 & H.R. 667 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (1995) at pp. 45-51(testimony of Lynne Abraham, District Attorney of Philadelphia); see also Ross Sandler & David Schoenbrod, Democracy by Decree 183-192 (2003); Sarah B. Vandenbraak, *Bail Humbug! Why Criminals Would Rather Be In Philadelphia*, Policy Review 73 (Summer 1995) (detailed description of the impact of the Federal court injunctions).

[7] The written testimony from this hearing can be found at http://www.savecoalition.org/latestdev.html. Many of the provisions found in H.R. 4109 are based on a resolution passed by the American Bar Association. The resolution is attached to the testimony of Margo Schlanger who testified on behalf of the ABA.

sought more time to work out possible compromise language. However, the bill cannot be marked-up or voted out of the Committee until there has been a public hearing.[8]

IV. H.R. 4109: SECTION-BY-SECTION ANALYSIS

SEC. 1. Title

- Self-explanatory.

SEC. 2. (Physical Injury)

- **Summary**: This section would seek to eliminate two provisions relating to the "physical injury" requirement. First, subsection (b) would amend the Federal Tort Claims Act (28 U.S.C. § 1346(b)) to remove the current limits on claims for emotional or mental injuries by federal prisoners. In addition, subsection (a) would eliminate the PLRA provision that extended the Federal Tort Claims Act limitation to all prisoner lawsuits. (28 U.S.C. §1346, as it would be amended by H.R. 4109(2), is set forth in the attached appendix.)

- **Analysis**: The Federal Tort Claims Act has long had a limitation on prisoner claims for emotional or mental injuries. The proposed amendments in Section 2 would eliminate this Federal Tort Claims provision[9] and matching PLRA provision for all prisoner lawsuits.[10] These provisions were designed to shield prison officials from insubstantial claims. Courts, for the most part, have interpreted these provisions simply to bar *de minimus* claims. Prisoner

[8] The November 8, 2007 hearing related to the underlying substantive issues and was not a hearing on H.R. 4109. Up-to-date information on the status of H.R. 4109 can be found at http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.4109.

[9] H.R. 4109 (2) (b) would amend the Federal Tort Claims Act, 28 U.S.C. § 1346, by striking subsection (b)(2), which contains the following:

> ~~(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~

[10] H.R. 4109 (2) (a) would strike the following from 42 U.S.C. 1997e (e):

> ~~(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~

advocates have argued, however, that the provisions would bar claims for sexual assaults and religious/First Amendment claims.

Despite prisoner advocates' claims, Federal appellate courts consistently hold that forcible sexual assaults include a "physical injury" and are not barred under this section.[11] Despite this clear weight of authority, some unpublished district court opinions have found such claims to be barred by the physical injury requirement.[12]

SEC. 3 (Administrative Remedies)

- **Summary**: Section 3 would eliminate the current PLRA requirement that a prisoner exhaust available administrative remedies before filing suit in Federal court. Section 3 would instead allow prisoners to file Federal lawsuits first, then stay the action to pursue administrative remedies.

- **Analysis**:

 - **Current law**: The current PLRA provision, found in the Civil Rights for Institutionalized Persons Act (CRIPA) at 42 U.S.C. § 1997e, requires inmates to file administrative grievances before filing a Federal lawsuit. This provision was enacted in 1996 because Congress believed that the prior CRIPA exhaustion provisions were ineffectual.

 The exhaustion requirement is strongly supported by corrections officials and government lawyers who defend prisoner lawsuits. By strengthening the grievance requirement, prison managers are more likely to be promptly alerted to problems arising in the prison, able to take immediate action to prevent

[11] See, e.g., Liner v. Goord, 196 F.3d 132, 135 (2d. Cir 1999) (alleged sexual assault not barred by physical injury requirement of 1997e(e)); Styles v. McGinnis, 28 Fed. Appx. 362 (6th Cir. 2001) (claim arising out of an allegedly involuntary rectal exam was not barred by 1997e(e)); Williams v. Prudden, 67 Fed. Appx. 976 (8th Cir. 2003) (civil rights complaint based on alleged sexual assault of female prisoner by corrections officer not barred by 1997e(e)); see also, Kemner v. Hemphill, 199 F. Supp. 2d 1264 (N.D. Fla 2002) (complaint alleging two-hour sexual assault by another prisoner not barred by 1997e(e)).

[12] Compare Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, *5-6, 2006 WL 314514 at *2 (M.D. Pa. Feb. 9, 2006) (holding that allegation that female officer grabbed the prisoner's penis and held it in her hand was *de minimus* under § 1997e(e)) with Hancock v. Payne, Civil Action No. 1:03cv671, 2006 U.S. LEXIS 1648, 2006 WL 21751 (S.D. Miss. Jan. 4, 2006) (at summary judgment stage, where prisoners failed to support complaint allegations that raised claims of consensual conduct and sexual assaults, court found that plaintiffs had failed to adequately demonstrate a genuine issue of material fact as to a physical injury).

similar harms to other inmates, and able to mitigate harms to the inmate who raised the issue in the grievance. This provision was also designed to promote dispute resolution without the need for a Federal lawsuit.

With this exhaustion requirement, Congress also struck a balance between the need to encourage prompt notice to prison officials and the inmate's ability to file meritorious claims. For example, where administrative grievances are not "available" to the individual inmate, there is no exhaustion requirement. (The Federal courts have interpreted this "availability" requirement very favorably for inmates.)[13] Additionally, inmates who do not comply with exhaustion requirements are still permitted to file state court actions.

- **Proposed Amendment**: Under the proposed amendment, an inmate would not need to exhaust grievances before filing in Federal court. Rather, the inmate could first file the complaint, and then the civil action could be stayed for up to 90 days in order to allow the prisoner to pursue administrative grievances. However, there would be no stay if the prisoner was "in danger of immediate harm."[14]

[13] See detailed analysis and cases cited in John Boston, The Legal Aid Society, Prisoners' Rights Project, *The Prison Litigation Reform Act* 108-125 (February 27, 2006), *available at* http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf (extensive analysis and case citations relating to whether remedies are "available" under the PLRA).

[14] Specifically, Section 3 would amend 42 U.S.C. § 1997e as follows:

42 U.S.C. § 1997e. Suits by prisoners

~~(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.~~

(a) Administrative Remedies-

(1) PRESENTATION- No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

- **Positions On the Proposed Amendment**:

 - **Proponents:** The proponents of this amendment have argued that (1) the current exhaustion provision is too restrictive; (2) it prevents meritorious lawsuits when prisoners are effectively precluded from filing administrative grievances through threats of retaliation; and (3) prisoners face great difficulty in navigating complex grievance procedures with short time limits.

 - **Opponents;** Correctional managers believe that the proposed amendment would effectively eliminate the prison management benefits of prompt inmate grievances (dispute resolution, prevention of future harms, and mitigation of harms). In other words, the proposed amendments would encourage prisoners to complain first to the Federal courts before they make any attempt to alert prison managers to the purported problems or attempt to resolve the matter promptly without litigation. Opponents of this amendment also cite to (1) opinions that hold that where grievances are not "available" to a prisoner because of the actions of correctional officials, the PLRA limit does not apply; [15] (2) grievance procedures that contain explicit provisions barring staff from retaliation; (3) the independent

(2) STAY- If a claim included in a complaint has not been presented as required by paragraph (1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

(3) PROCEEDING- Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved.

[15] See, e.g., Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004) (threat of criminal charges made grievances unavailable); Brown v. Croak, 312 F.3d 109, 112-13 (3d. Cir. 2002) (holding that grievance system was "unavailable" to prisoner if (as alleged) security officials told the plaintiff to wait for the completion of the investigation before grieving, and then never informed him of its completion); Dole v. Chandler, 438 F.3d 804 (7th Cir. 2006) (holding that "[p]rison officials may not take unfair advantage of the exhaustion requirement" and that " remedy becomes "unavailable" if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]" is not an 'available' remedy under § 1997e(a)..."); Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999) (holding that grievance decisions that stated it was non-appealable need not be appealed).

"retaliation" claims that arise for such retaliator conduct;[16] and (4) the prisoner's right to pursue claims in state courts even when they have not complied with the grievance requirement.

SEC. 4. (Juveniles)

- **Summary**: The amendments in Section 4 would eliminate the following for persons under the age of 18: (1) limits on injunction orders and consent decrees (including release orders); (2) *in forma pauperis* filings; (3) the requirement to exhaust administrative grievances; (4) judicial screening of complaints, (5) video-conferencing technology for hearings, and (6) attorney fee limits. Most of these issues are the subject of other proposed amendments in HR 4109. Section 4 contains separate amendments that would completely exclude persons under the age of 18.

- **Analysis**:
 - **Section 4(a)**: Section 4(a) proposes to amend definitional provisions to remove persons under the age of 18 from the PLRA limits on injunctions and consent decrees.[17] Currently, 18 U.S.C. § 3626 contains very specific

[16] Prisoners can file civil rights actions commonly known as "retaliation claims" when they are subject to retaliation for the filing of an administrative grievance. The basic law on retaliation is found in the Supreme Court's decision in Mount Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977) (discussing general elements of a retaliation claim---protected conduct by plaintiff, adverse action by defendant, and causation). The Federal courts have repeatedly held that the filing of a grievance is conduct the First Amendment protects and that retaliation against an inmate for filing a grievance is a clear basis for a separate civil rights action. See, e.g., Mitchell v. Horn, 318 F.3d 523 (3d. Cir. 2003) (allegation that false disciplinary charges were filed to retaliate for the filing of complaints against the officer states a First Amendment claim); Siggers-El v. Barlow, 412 F.3d 693 (6th Cir. 2005) (retaliation claim sustained where prisoner alleged he was punished for filing a complaint).

[17] These definitional provisions are found in 18 U.S.C. § 3626 and would be amended as follows:

> (g) Definitions. As used in this section--
> * * * * *
> (3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;
> (4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;
> (5) the term "prison" means any Federal, State, or local facility that incarcerates

provisions relating to prisoner release orders (they can be entered only by a three-judge panel as a last-resort remedy following a finding of a constitutional violation for overcrowding). The amendment proposed by Section 4(a) would remove persons under the age of 18 from these provisions. Thus, there would be no statutory limits on Federal release orders for persons under the age of 18 who were convicted as adults for the crime of murder. (Additional limits on this section are proposed in Section 6 of HR 4109 and will be discussed later.)

Eliminating juveniles from the PLRA prisoner release limits is expected to be controversial among those who want limitations on injunctions, consent decrees, and release orders in institutional lawsuits involving facilities for juvenile delinquents and juvenile convicted on adult criminal charges. Given the serious crime issues involving persons under the age of 18, opponents will likely raise concerns about returning to a time when civil rights injunctions and consent decrees required the release of juvenile offenders.

In Philadelphia, for example, there was a 1978 consent decree limiting the capacity of the City's only secure juvenile detention facility. By 1990, that consent decree had been amended three times and contained provisions identical to the prisoner release orders described supra at p.4. See Santiago v. City of Philadelphia, CA No. 74-2587, 1990 U.S. Dist. LEXIS 4308 (E.D. Pa. April 4, 1990). Under this decree involving the Youth Study Center, Philadelphia was barred from holding certain juveniles in secure detention, no matter how many crimes they committed or how many times they had escaped from non-secure community placements. One juvenile, for example, was repeatedly released under this consent decree despite numerous arrests for car thefts and escapes from non-secure detention facilities. He was held in secure detention only after he stole another car, fled from police, and crashed. He killed a widower with 9 children and a young girl, and made her sister a paraplegic.[18]

- **Section 4(b):** This subsection would amend CRIPA (Civil Rights of Institutionalized Persons Act) to remove persons under the age of 18 from the provisions contained in 42 U.S.C. § 1997e. These provisions relate to the

or detains prisoners ~~juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law~~;

* * * * * * * * *

(h) Exclusion of Child Prisoners—This section does not apply with respect to a prisoners who has not attained the age of 18 years.

[18] See *Boy in Fatal Joyride Had 13 Prior Arrests/Walked Away from City Detention Facilities,* Philadelphia Daily News, October 26, 1988, p. 4.

exhaustion of administrative grievances, the judicial screening provisions, the use of video-conferencing for hearings, and attorneys fees. This exclusion of persons under the age of 18 would be accomplished by amending the current definition of "prisoner" in 1997e(h)[19] and by adding a new exclusion subsection (i).[20] (These amendments, and the other proposed amendments to 42 U.S.C. § 1997e, are in the attached appendix.) Again, the proposed provisions would apply to persons under the age of 18 who have been tried and convicted for adult charges.

Proponents of the amendments, while seeking amendments to the overall exhaustion provisions, are focusing on whether it is fair to require juveniles to exhaust complex administrative grievances. They have argued that because juveniles lack the capacity to contract, it seems unreasonable to expect them to file written documents that can limit their future legal options. The focus seems to be on sexual assault cases. Notably, many states have been expanding the legal rights for juvenile sexual assault victims through changes to statutes of limitations (criminal and civil) and have imposed additional reporting requirements for when persons in positions of trust suspect abuse.

So far, however, proponents have not raised significant justifications for the screening and video-conferencing provisions. Their arguments concerning the attorneys fees limits have been raised as to all inmates and do not appear to have additional specific issues particular to juveniles.

Opponents to the amendments appear more focused on the attorneys fee limits as there have been historic concerns about whether the attorneys fee provisions provide economic incentives for sweeping institutional litigation that does not focus on the narrow constitutional issues. These concerns have applied to institutional class actions involving adult and juvenile facilities.

- **Section 4(c):** This subsection would amend the prisoner *in forma pauperis* provisions in 28 U.S.C. §§ 1915 and 1915A to remove persons under the age

[19] 42 U.S.C. §1997e(h) would be amended as follows:

(h) As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

[20] The new subsection, 42 U.S.C. §1997e(i) would read as follows:

(i) Exclusion of Child Prisoners- This section does not apply with respect to a prisoner who has not attained the age of 18 years.

of 18. The § 1915 provisions concern notice to the court concerning money in the prisoner's account and installment payments. The amendments to § 1915A would exclude persons under the age of 18 from dismissal of complaints that are frivolous, malicious, or fail to state a claim.[21] The amendments in this subsection would thus prevent application of any of these provisions to persons under the age of 18 even if they have been convicted as adults or have been emancipated.

SEC. 5. (*In Forma Pauperis* ("IFP") "three-strikes" provision)

- **Summary**: This section involves whether prisoners who have filed three or more meritless lawsuits must pay full filing fees before filing Federal lawsuits. The provision at issue is commonly known as the "three-strikes" provision.

- **Current Law**: Current IFP "installment" provisions allow prisoners to file Federal lawsuits without paying the filing fee up front but rather to make installment payments. This installment payment right is limited, however, by a "three-strikes" provision. This provision does not permit the installment payment system if a prisoner has previously filed three or more meritless lawsuits, unless he is in imminent danger of serious bodily injury. For prisoners who have "three-strikes" and do not meet the imminent danger requirement, they must pay the full filing fee before filing a Federal lawsuit.

- **Proposed Change**: Section 5 would change the current "three-strikes" provision in two ways. First, it would limit the three-strikes to those lawsuits the prisoner filed in the preceding 5 years. Second, it would limit the types of strikes---repeated meritless lawsuits would not count as "strikes" unless the government proved that they arose to the level of "frivolous" or "malicious" actions.[22]

[21] H.R. 4109 (4)(c) would amend the sections defining "prisoner" with the identical language. These amendments the 28 U.S.C. § 1915(h) and 1915A(c) would be as follows:

> As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

[22] Specifically, H.R. 4109 (5) would amend 28 U.S.C. § 1915(g) as follows:

> (g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions within the preceding 5 years, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious ~~, malicious, or fails to~~

- **Analysis**: Caselaw is clear that prisoners do not have a constitutional right to be excused from paying filing fees prior to filing lawsuits.[23] Congress thus has great leeway in making policy choices about when IFP status should be granted to prisoners. Congress has already limited the "three-strikes" in the following ways: (1) they don't bar lawsuits, they just require prisoners to pay the full fee before they file; (2) they don't apply to state actions; and (3) they don't apply to claims where the prisoner is in imminent danger of serious bodily injury.

- **Positions**: Proponents have asserted that the "three-strikes" provisions essentially works as a lifetime ban. They question the fairness of imposing a lifetime ban for strikes incurred when a prisoner was very young but later stopped filing multiple lawsuits. Proponents also question the fairness of imposing a "strike" where a prisoner "fails to state a claim" since the prisoner could legitimately be seeking to remedy a problem but it simply failed to meet the high standard of a constitutional issue. Additionally, proponents have argued that the "three-strikes" exception---for imminent danger of serious bodily injury---only applies to the inmate's current condition and does not allow the inmate to seek redress for significant past injuries.

 Opponents of H.R. 4109 are likely to focus on the three-strike standard rather than the time limit issue. The proposed amendment would return to the "frivolous" or "malicious" standard which was ineffective in reducing meritless lawsuits. They will likely point to the need to discourage meritless lawsuits and to encourage prisoners to be careful about the lawsuits they file. They will probably point to the significant financial costs faced by state and local governments in responding to meritless lawsuits.

SEC. 6. (Federal Injunctions)

- **Summary**: This section would substantially amend 18 U.S.C. § 3626 and eliminate the major provisions of the Prison Litigation Reform Act (PLRA). Specifically, this section would amend the current limits on Federal court injunctions and consent decrees in prison cases. Specifically, these amendments would:
 - eliminate the provisions limiting federal court injunctions and consent decrees to the least intrusive remedies upon consideration of any adverse impact on public safety and the criminal justice system;
 - eliminate the comity provisions that limit the circumstances when state laws may be violated or state checks and balances circumvented;

~~state a claim upon which relief may be granted~~, unless the prisoner is under imminent danger of serious physical injury.

[23] See, e.g., Wilson v. Yaklich, 148 F.3d 596 (6th Cir. 1998) (rejecting numerous constitutional challenges to the PLRA *in forma pauperis* provisions for prisoners).

- o significantly change the circumstances under which government officials can terminate consent decrees; and
- o eliminate the automatic stay provisions applicable to government-filed termination motions.

- **Subsection Analysis**:

 - o **Section 6(1) (limits on injunctions and consent decrees)**: This subsection would eliminate the PLRA provisions designed to minimize adverse effects of Federal injunctions that aren't necessary to remedy the constitutional violation. Under 18 U.S.C. § 3626(a)(1)(A), a Federal court must tailor the injunction to ensure that it extends no further than necessary to correct the constitutional violation. In making this determination, the court must specifically consider the potential impact on the criminal justice system or public safety. Under 18 U.S.C. § 3626(a)(1)(B), a Federal court cannot require state government officials to violate state law unless there is no other way to remedy the constitutional violation. The proposed amendments in H.R. 4109 § 6(1) would eliminate these sections in their entirety.[24]

 Proponents' testimony has not focused extensively on the proposed amendments in Section 6(1). These amendments would allow the return to the pre-PLRA landscape. Prisoners' rights advocates presumably preferred the ability they had to obtain longstanding injunctions and consent decrees as they believe that such measures would ensure long-term improvements in prison conditions. They argue that the PLRA constrains their ability to obtain good settlements.

[24] § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.
(1) Prospective relief.
~~(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.~~
~~(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—~~
~~(i) Federal law requires such relief to be ordered in violation of State or local law;~~
~~(ii) the relief is necessary to correct the violation of a Federal right; and~~
~~(iii) no other relief will correct the violation of the Federal right.~~

Opponents to the amendments do not want to return to the pre-PLRA world of incredibly complex injunctions and consent decrees that exceeded the minimum of court interference necessary to fix the constitutional problem. They assert that these types of injunctions (which would be very difficult to modify or terminate given the additional amendments in Section 6(3)) previously resulted in extensive court litigation over non-constitutional issues.[25] From a policy point of view, they also argue that it is difficult to justify the burdens caused by such a system on the Federal courts, state and local officials, and taxpayers. They can be expected to support the current PLRA system of requiring that extra-constitutional provisions be contained in a "private settlement agreement" enforceable through arbitration, the use of monitors, or state courts. See 18 U.S.C. §§ 3626(c)(2).

- **Subsection 6(2) (preliminary injunctions)**: This subsection would amend the provisions relating to preliminary injunctions.[26] Although it retains the limits designed to prevent overly intrusive preliminary injunctions, it eliminates provisions that allow Federal court injunctions to trump state laws (even when those provisions are not the only way to prevent the constitutional violation requiring the preliminary injunction). In addition, it eliminates the 90-day limit on preliminary injunctions. (Current law permits the 90-day injunction to continue if made final. Additionally, courts will often extend the preliminary injunction if new evidence is available.)

 This 90-day PLRA provision was originally created because many jurisdictions had preliminary injunctions remain in effect for years without the plaintiffs seeking a final injunction hearing. Officials saw this as problematic

[25] See legislative history to the PLRA and hearing testimony discussed supra.

[26] H.R. 4901 §(6)(2) would amend 18 U.S.C. § 3636(2) as follows:

> (2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief ~~and shall respect the principles of comity set out in paragraph (1)(B)~~ in tailoring any preliminary relief. ~~Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.~~

because preliminary injunctions could be based on hearsay evidence and are usually entered before full discovery.[27]

Proponents of these amendments have argued that the 90-day time period is too short to allow for a full trial in institutional litigation. They maintain that this can result in a reoccurrence of unconstitutional conditions after the 90-day period expires.

- **Subsections 6(3), 6(4), 6(5), & 6(6) (termination of injunctions/consent decrees):** These subsections would amend the PLRA provisions relating to the termination of injunctions. Subsection 6(3) would change the termination standards,[28] while subsection 6(4) would allow courts entering injunctions and consent decrees to, on their own, limit the future time period when a defendant could seek to terminate the order.[29] Subsection 6(5) strikes the

[27] For example, Pennsylvania was subject to a preliminary injunction relating to tuberculosis treatment that lasted almost 4 years. See Austin v. Pennsylvania Dep't. of Corrections, 876 F. Supp 1437, 1445-46 (E.D. Pa. 1995) (describing preliminary injunction in effect from 1992). This preliminary injunction ended in 1996 after the passage of the PLRA.

[28] H.R. 4901(6)(3) would amend 18 U.S.C. § 3626(b) as follows:

> (b) Termination of relief.
>
> (1) Termination of prospective relief.
>
> (A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur--
>
> (i) 2 years after the date the court granted or approved the prospective relief;
>
> (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
>
> (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

[29] H.R. 4901(6)(4) would amend 18 U.S.C. § 3626(b)(1)(B) as follows:

> (B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A). Nothing in this section shall prevent the court from extending any of the periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer that those time periods.

existing termination standard that would be replaced by the subsection 6(3) amendments.[30] Subsection 6(6) likewise would strike a reference to the provisions eliminated by subsection 6(4).[31]

Under current law, an injunction issued to remedy a constitutional violation can be terminated after 2 years if (1) the defendant files a termination motion, and (2) the plaintiff fails to demonstrate that there are current constitutional violations that require the injunction. Defendants are also entitled to immediate termination of improperly entered injunctions based on this same standard. The proposed amendment in 6(3) would change the termination standard.

Proponents of these changes to the termination provisions have argued that the PLRA time periods are too short. They assert that more time may be needed to ensure that future constitutional violations will not occur. Additionally, they believe that longer time periods can be essential to remedy past harms.

Opponents to H.R. 4901 believe this proposed change in standard is problematic for a number of reasons. First, they claim that it places the burden on the defendant to show that no current constitutional violations exist and that they won't occur in the future. They also argue that the Constitution presumes that state officials should run their prisons unless a Federal court removes this power to prevent a constitutional violation. The state's power to run its own prisons should not be removed when there are no existing

[30] H.R. 4901(6)(5) would amend 18 U.S.C. § 3626(b)(2)-(3) as follows:

~~(2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.~~
~~(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.~~

[31] H.R. 4901(6)(6) would amend 18 U.S.C. § 3626(b)(4) as follows:

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) ~~or (2)~~, to the extent that modification or termination would otherwise be legally permissible.

constitutional violations but prison officials can't meet the impossible burden proving what will happen in the future.

There are also concerns that the amendments to the termination standard would be even more problematic in the consent decree context where (under the HR. 4109 standards) there would be no required finding of a constitutional violation. Thus, there could be litigation years after the fact about what exactly "gave rise to" the consent order and whether those circumstances arose to the level of a constitutional violation.

The amendments contained in subsection 6(4) eliminate the current termination standards that preclude a court from terminating an injunction or consent decree if the order remains necessary to correct a current and ongoing violation of a Federal right. They also eliminate the requirement that the courts tailor old injunctions to keep only those provisions that address the Federal violation.

- **Subsection 6(7) (consent decrees)**: The proposed amendments here would strike the PLRA provision that specifies that consent decrees must meet the injunction standards set forth in 28 U.S.C. § 3626(a).[32]

 This provision, combined with other PLRA provisions, was considered essential by PLRA supporters to limit the broad sweeping decrees that had been entered on consent and that remained in effect for decades. At the time of the PLRA's passage, there were many examples of current prison administrators burdened by long-standing, detailed consent decrees that required them to follow costly non-constitutional mandates, abide by out-date security practices, and engage in policies that were a threat to the public, inmates and staff.

[32] H.R. 4901(6)(7) would amend 28U.S.C. § 3626(c) as follows:

(c) Settlements.

~~(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).~~

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

Proponents of the H.R. 4109(6)(7) amendments contend that the limits on consent decrees have resulted in fewer settlements by government officials. They also argue that the use of "private settlement agreements" have resulted in ineffectual settlements that do not protect prisoners' rights.

- **Subsection 6(8) (automatic stay)**: This subsection proposes to eliminate the automatic stay provision for termination proceedings.[33] Under current law, if a judge does not timely rule on a termination motion, the injunction will be stayed after 90 days (30 days plus a 60-day extension) until the judge rules on the motion.

 This PLRA provision was originally adopted in the 1997 amendments to the PLRA based on government concerns that courts were effectively denying government requests to terminate injunctions by refusing to rule on the

[33] Section 6(8) would amend 28U.S.C. § 3626(E) as follows:

(e) Procedure for motions affecting prospective relief.
(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.
~~(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period –~~
~~(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or~~
~~(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and~~
~~(B) ending on the date the court enters a final order ruling on the motion.~~
~~(3) Postponement of automatic stay. The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.~~
~~(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.~~

termination motion.[34] Without prompt decisions on termination motions, state and local governments face huge operational and financial costs.[35] Proponents of the amendments argue that the automatic stay provision disrupts ongoing injunctions that may still be necessary to remedy or prevent constitutional harms. They also argue that the 90-day time period is too short given the current burden on the plaintiff to prove "current and ongoing" constitutional violations.

SEC. 7. (Attorneys Fees)

Summary: This section would remove the current limitations on attorneys fees for prisoners. Specifically, this would amend CRIPA (the Civil Rights of Institutionalized Persons Act), 42 U.S.C. 1997e, by striking the attorneys fees provisions in subsection (d).[36]

[34] For example, in Miller v. French, 530 U.S. 327 (2000) (upholding the constitutionality of the PLRA's automatic stay provision), the Federal judge had refused to take any action on the termination motion for over 3 years. See French v. Duckworth, 178 F.3d 437, 449 (1999) (lower court decision in Miller v. French) (Easterbrook, J., dissenting from the denial of rehearing en banc) (noting that once the district court declared the automatic stay unconstitutional two years ago it "has yet to take a single step" in ruling on the PLRA termination motion and the "process that is supposed to be rapid drags on with no end in sight"); see also Ruiz v. Estelle, 5th Cir. Order, Dec. 16, 1998 (directing district court to enter a final order by March 1, 1998 on PLRA termination motion filed in September 1996); Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991) (noting the district court's 2 1/2 year delay in ruling on an intervention motion challenging a prison population cap).

[35] For example, federal court injunctions in Michigan required the break up of the Southern Michigan State Prison and the construction of new prisons. Even though Michigan filed a PLRA termination motion on June 10, 1996, the district court blocked implementation of the automatic stay. Although the Court of Appeals granted a discretionary stay, Michigan faced five to ten million dollars in construction delay costs while awaiting a final decision on its termination motion. See Implementation of the Prison Litigation Reform Act: Hearings before the Senate and House Committees, 104 Cong. (1996) (statement of Michigan Gov. Engler).

[36] Specifically, H.R. 4109(7) would amend 42 U.S.C. § 1997e by striking (d) as follows:

~~(d) Attorney's fees.~~

~~(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—~~

~~(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be~~

Analysis: Under current law, prisoners are entitled to limited attorneys fees. These fees cap the rate at 150% of the rate for Federal court-appointed attorneys, establish a proportionality requirement, prohibit fees for ancillary litigation, and eliminate the catalyst theory as a basis for relief. Because the Civil Rights Act does not contain these same limitations, prisoners' rights attorneys want to increase the attorneys fees available for prisoner litigation. This position is, in part, based on the belief that prisoners should be treated like other civil rights plaintiffs. Additionally, prisoners' rights attorneys have argued that the PLRA fee limits are too severe and they are preventing prisoners with legitimate constitutional claims from obtaining representation.

Opponents to H.R. 4901 assert that removal of the PLRA attorneys fees limits is unwarranted. They have argued that the current fees still provide a financial incentive for focused constitutional litigation and substantial claims. Under existing provisions, prisoners' attorneys fees are more favorable for prisoners in Federal prisons than for rape victims who sued their rapists or wounded veterans who seek recovery for malpractice.[37] Currently, prisoners' rights attorneys who prove constitutional violations are entitled to substantial fees. See Bowers v. City

~~awarded under section 2 of the Revised Statutes; and~~

~~(B)~~

~~(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or~~

~~(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.~~

~~(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.~~

~~(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.~~

~~(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).~~

[37] For a detailed description of attorneys fees awarded in other types of cases and how they compare to the current PLRA attorney fee provisions, see Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003) (en banc) (upholding the constitutionality of the PLRA attorney fee provisions).

of Philadelphia (E.D. Pa. No. 06-3229) (prisoners' rights attorney awarded $250,000 for successful preliminary injunction litigation).

SEC. 8. (Filing Fees *in forma pauperis*)

- **Summary**: This section would amend the current *in forma pauperis* (IFP) provisions that apply to prisoners.[38] Specifically, subsection 8(1) would amend 28 U.S.C. § 1915(b)(1) to allow prisoners to pay no filing fees for their appeals, and subsection 8(2) would eliminate the payment of filing fees for complaints if they were dismissed at initial screening as frivolous or malicious or for failing to state a claim.

 Positions: Proponents of the IFP amendments argue that the current provisions unnecessarily restrict prisoner appeals. They also contend that prisoners should not have to pay full filing fees when the case is promptly dismissed without major expenditures for the courts and the government defendants.

 Opponents to the proposed IFP amendments assert that they would return us to the time when prisoners could file meritless suits at no cost. The current partial filing fee system led to a substantial reduction in meritless suits filed in the Federal courts. While prisoners with no money whatsoever can file lawsuits under the PLRA, the current IFP installment provisions require a prisoner with money to make some commitment of funds before bringing a Federal lawsuit. Opponents of H.R. 4901 argue that this is precisely the same choice that every free citizen must make when he or she decides to file a lawsuit.

SEC. 9. (Technical Amendment)

[38] H.R. 4901 § (8)(1) & (2) together would amend 28 U.S.C. § 1915(b)(1) as follows:

> (b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action ~~or files an appeal~~ in forma pauperis, and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights on Institutionalized Persons Act (42 U.S.C. 1997e(c)(1)) the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of–
>
> (A) the average monthly deposits to the prisoner's account; or
>
> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

Summary: This is a technical amendment of the IFP provisions, 28 U.S.C. § 1915(a)(1), relating to the affidavit that must accompany an IFP petition.[39]

[39] (a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit ~~that includes a statement of all assets such prisoner possesses~~ (including a statement of assets such person possesses) that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

APPENDIX

I. Amendments to PLRA limits (injunctions, consent decrees, and juveniles)

18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.

(1) Prospective relief.

~~(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.~~

~~(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--~~

~~(i) Federal law requires such relief to be ordered in violation of State or local law;~~

~~(ii) the relief is necessary to correct the violation of a Federal right; and~~

~~(iii) no other relief will correct the violation of the Federal right.~~[40]

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief ~~and shall respect the principles of comity set out in paragraph (1)(B)~~ in tailoring any preliminary relief. ~~Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.~~[41]

(3) Prisoner release order.

(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to

[40] H.R. 4109(6)(1) would eliminate subsections (a)(1)(A) & (B).

[41] H.R. 4109(6)(2) would amend subsection (a)(2).

remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur--[42]

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A). Nothing in this section shall prevent the court from extending any of the periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer that those time periods.[43]

[42] H.R. 4109(6)(3).

[43] H.R. 4109(6)(4).

~~(2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.~~[44]

~~(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.~~[45]

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) ~~or (2)~~,[46] to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.

~~(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).~~[47]

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies. The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

~~(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period~~

[44] H.R. 4109(6)(5).

[45] Id.

[46] H.R. 4109(6)(6).

[47] H.R. 4109(6)(7).

~~(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or~~
~~(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and~~
~~(B) ending on the date the court enters a final order ruling on the motion.~~
~~(3) Postponement of automatic stay. The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.~~
~~(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.~~ [48]

**** [special master provisions, (f), not amended]*******

(g) Definitions. As used in this section--
(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;
(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;
(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;
(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;
(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains prisoners ~~juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law~~;
(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;
(7) the term "prospective relief" means all relief other than compensatory monetary damages;
(8) the term "special master" means any person appointed by a Federal court pursuant

[48] H.R. 4109(6)(8) (amending subsections (2)-(4)).

to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

(h) Exclusion of Child Prisoners—This section does not apply with respect to a prisoners who has not attained the age of 18 years. [49]

II. Amendment to CRIPA (exhaustion, attorneys fees, physical injury, and juveniles)

42 U.S.C § 1997e. Suits by prisoners

~~(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.~~

(a) Administrative Remedies-

(1) PRESENTATION- No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

(2) STAY- If a claim included in a complaint has not been presented as required by paragraph (1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

(3) PROCEEDING- Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved. [50]

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute

[49] H.R. 4109(4)(a) (amending (g)(3) and (g)(5) and adding (h)).

[50] H.R. 4109(3) (replacing (a)).

the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) Dismissal.

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

~~(d) Attorney's fees.~~

~~(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—~~

~~(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and~~

~~(B)~~

~~(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or~~

~~(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.~~

~~(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.~~

~~(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court appointed counsel.~~

~~(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).~~ [51]

~~(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~ [52]

[51] H.R. 4109(7).

[52] H.R. 4109(2)(a).

(f) Hearings.

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply.

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(i) Exclusion of Child Prisoners—This section does not apply with respect to a prisoner who has not attained the age of 18 years.[53]

III. Amendments to IFP Provisions (partial filing fees, screening, and juveniles)

28 U.S.C. § 1915. Proceedings in forma pauperis

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit ~~that includes a statement of all assets such prisoner possesses~~

[53] H.R. 4109(4)(6) (amending (h) and adding (i)).

(including a statement of assests such person possesses)[54] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action ~~or files an appeal~~ in forma pauperis, and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights on Institutionalized Perions Act (42 U.S.C. 1997e(c)(1))[55] the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of

[54] H.R. 4109(9) (technical amendment to (a)(1)).

[55] H.R. 4109(8).

proceedings conducted pursuant to section 636(c) of this title [28 USCS § 636(c)]. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions within the preceding 5 years, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious ~~, malicious, or fails to state a claim upon which relief may be granted~~, unless the prisoner is under imminent danger of serious physical injury.[56]

(h) As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.[57]

[56] H.R. 4109(5).

[57] H.R. 4109(4)(c).

28 U.S.C. § 1915A. Screening

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition. As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.[58]

IV. Federal Tort Claims Act (physical injury)
§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of:
(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
(2) Any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) (1) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and

[58] H.R. 4109(4)(c).

after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

~~(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~[59]

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 [28 USCS § 6226, 6228(a), 7426, or 7428] (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179 [28 USCS §§ 3901 et seq.], the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title [3 USCS §§ 401 et seq].

[59] H.R. 4109(2)(b).



Written Testimony of
Marian Wright Edelman
President, Children's Defense Fund

Hearing on H.R. 4109, the "Prison Abuse Remedies Act of 2007"

House Judiciary Subcommittee on Crime, Terrorism and Homeland Security

April 22, 2008

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Chairman Scott and members of the Subcommittee on Crime, Terrorism, and Homeland Security:

I am Marian Wright Edelman, President of the Children's Defense Fund (CDF). I appreciate the opportunity to submit a written statement on the application of the Prison Litigation Reform Act (PLRA) to children and youth. I respectfully request that the Subcommittee take the necessary action to exclude children and youth from the requirements of the PLRA in order to eliminate the barriers it creates to their accessing a federal court when they allege their constitutional or statutory rights have been violated.

The mission of CDF, a nonprofit organization, is to ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start* and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. We pursue our mission through policy research, analysis and advocacy that promotes reforms on behalf of and increased investments in children that hold the promise of achieving these goals. In furtherance of our mission, CDF recently embarked on a comprehensive analysis of the many problems, policies and systems that funnel tens of thousands of children and youth down life paths that can and often do lead to arrest, conviction, incarceration and, in some cases, death. That research culminated in the publication of our report, "America's *Cradle to Prison Pipeline*SM." That report, coupled with the conduct of a National Summit, marked the formal launch of our Cradle to Prison Pipeline® Campaign, a multi-pronged strategy that utilizes community education, social mobilization and policy advocacy to promote greater equity of opportunities for all children. Concurrently, we continue to fight for policies that ensure access to timely, quality health care,

early childhood development, and education programs, and improvements to the child welfare system.

A critical component of our *Cradle to Prison Pipeline* Campaign is to accelerate reforms of juvenile justice policy at the federal, state and local levels to ensure that children and youth get the integrated services necessary to put them on a sustained path to a successful adulthood. We work closely with the National Juvenile Justice and Delinquency Prevention Coalition to advocate for the federal policy and investment needed to support improvements to state and local juvenile justice systems and promote evidence-based prevention and intervention strategies as a means to address juvenile crime. We also work with advocacy groups in states that are advancing systemic reform to state juvenile justice systems with special attention to improving the conditions, education and rehabilitation of youth offenders. Excluding children and youth from the PLRA is a critical step in such collective efforts to improve the conditions of their confinement.

In 1996, Congress enacted the PLRA in order to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. . . .[and] help restore balance to prison conditions litigation and [] ensure that Federal Court Orders are limited to remedying actual violations of prisoners' rights."[1] In order to accomplish this, the PLRA sets a number of limitations to prisoners filing suit in federal court. Relevant provisions include: a prohibition against prisoners filing lawsuits for mental or emotional injury without demonstrating a "physical injury;"[2] requiring prisoners to exhaust all administrative remedies prior to filing suit in federal court;[3] and

[1] 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995)(statement of Sen. Hatch).
[2] 42 U.S.C. § 1997e(e).
[3] 42 U.S.C. § 1997e(a).

restrictions on attorneys' fees in prisoner cases.[4] These provisions currently apply to both incarcerated adults and youth.[5]

While certain provisions of the PLRA have successfully limited frivolous suits, many advocates argue that some of the PLRA's requirements pose a significant barrier for incarcerated adults and youth to filing meritorious claims in court. The number of federal cases filed by prison inmates has declined since the passage of the PLRA. However, recent research and analysis indicates that it is unclear whether the PLRA is effectively limiting only frivolous claims.[6] Rather, inmate cases that are filed in federal court are actually "less successful than before the PLRA's enactment."[7] Many feel that, as a result of the PLRA, constitutionally meritorious claims are facing "insurmountable obstacles" before they can move forward in federal court.[8]

The extent of abuse against incarcerated youth nationwide is morally reprehensible. One need only look to the recent scandals plaguing the Texas Youth Commission and Mississippi's Columbia Training School for evidence of how vulnerable incarcerated youth are to abuse.[9] A recent Associated Press survey found more than 13,000 claims of abuse were identified in juvenile correction centers around the country from 2004 through 2007.[10] Many experts feel that this number represents a significant underreporting of the extent of abuse, with thousands of

[4] 42 U.S.C. § 1997e(d).
[5] 42 U.S.C. § 1997e(h).
[6] MARGO SCHLANGER & GIOVANA SHAY, AM. CONSTITUTION SOC'Y, PRESERVING THE RULE OF LAW IN AMERICA'S PRISONS: THE CASE FOR AMENDING THE PRISON LITIGATION REFORM ACT" 2 (2007), *available at* http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf.
[7] *Id.*
[8] *Id.*
[9] Adam Nossiter, *Lawsuit Filed Over Treatment of Girls at State Reform School in Mississippi*, N.Y. TIMES, July 12, 2007, *available at* http://www.nytimes.com/2007/07/12/us/12prison.html; Ralph Blumenthal, *One Account of Abuse and Fear in Texas Youth Detention*, N.Y. TIMES, March 8, 2007, *available at* http://www.nytimes.com/2007/03/08/us/08youth.html.
[10] Holbrook Mohr, *AP: 13,000 Abuse Claims in Juvie Centers*, USA TODAY, March 2, 2008, *available at* http://www.usatoday.com/news/topstories/2008-03-02-1668706373_x.htm.

incidents believed to go unreported. In July 2005, the U.S Department of Justice released a report stating that state-operated juvenile facilities had the highest rates of alleged staff sexual misconduct compared to state and federal prisons.[11] Youth detained in adult jails are also at high risk of becoming victims of physical and sexual assault.[12]

Children and youth should be excluded from the requirements of the PLRA. First and foremost, children do not file frivolous lawsuits. While the United States Supreme Court acknowledged the right to counsel for juveniles in delinquency proceedings,[13] no such right to counsel exists when they challenge the conditions of their confinement. Many incarcerated children and youth lack adequate legal representation to assist them if they allege abuse or violation of other rights. They certainly do not have the capacity to file frivolous claims in court without counsel.

The PLRA also places an unreasonable burden on the thousands of incarcerated children and youth that face abusive conditions of confinement. The exhaustion requirement alone is a significant enough reason to exclude juveniles from the requirements of the PLRA. Children and youth who face abusive conditions of confinement are far less capable than adults of following the difficult and often convoluted administrative processes to which they must adhere in order to exhaust all of their administrative remedies as outlined by the PLRA. Moreover, administrative processes often require youth to report abuse to their abusers or subordinates of their abusers. Many youth fear or risk retaliation if they file an administrative complaint. The fact that most children and youth cannot overcome these hurdles effectively insulates

[11] A.J. BECK & T.A. HUGHES, U.S. DEPT. OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 5 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf.
[12] CAMPAIGN FOR YOUTH JUSTICE, The CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 7 (2007).
[13] *In re Gault*, 387 U.S. 1, 36 (1967).

correctional facilities from accountability for deplorable detention and correctional facility conditions.

Allowing this kind of violence against children and youth to persist contradicts the rehabilitative mandate set out for the juvenile justice system. It is extremely difficult for youth to focus on education and treatment amidst abusive conditions. This kind of violence against children and youth can also create a cycle of abuse that could perpetuate itself once they are released and increase the likelihood that they will reoffend.

We must have a system that adequately protects the rights of incarcerated children and youth. As such, I respectfully request that the Subcommittee take the necessary action to exclude children and youth from the requirements of the PLRA. Such action would eliminate the barriers to federal courts the PLRA creates for children and youth when they allege that their constitutional or statutory rights have been violated. I thank Chairman Scott and the members of the Committee for the opportunity to submit written testimony.

Testimony for the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security
April 22, 2008
By the Coalition to Stop Abuse and Violence Everywhere (SAVE Coalition)

The Coalition to Stop Abuse and Violence Everywhere (SAVE Coalition) is a broad, non-partisan group of organizations and individuals dedicated to protecting the U.S. prison and jail population from violence and abuse. Since the 1996 enactment of the Prison Litigation Reform Act (PLRA), millions of men, women, and children in prisons and jails have become increasingly vulnerable. The SAVE Coalition includes faith-based organizations; legal organizations; advocacy organizations for rape survivors, children, and the mentally ill; and others. Members of the SAVE Coalition have studied the impact of the PLRA and developed proposed reforms to the law that do not interfere with its stated purpose: to reduce frivolous litigation by prisoners. The SAVE Coalition strongly supports the proposed fixes to the PLRA included in H.R. 4109, the "Prison Abuse Remedies Act of 2007."

The unintended consequences of the PLRA have proven extremely harmful, at times barring meritorious claims, including those of rape, assault, and religious rights violations, from ever reaching federal court. Attached as **Appendix One** are examples of constitutional claims dismissed before the merits were considered because of the PLRA's draconian requirements. *See also* Testimony of Garrett Cunningham before the House Judiciary Subcommittees on Crime, Terrorism, and Homeland Security and Constitution, Civil Rights and Civil Liberties (November 8, 2007); Testimony of SAVE Coalition before the House Judiciary Subcommittees on Crime, Terrorism, and Homeland Security and Constitution, Civil Rights and Civil Liberties (November 8, 2007); Testimony of Stop Prisoner Rape before the House Judiciary Subcommittees on Crime, Terrorism, and Homeland Security and Constitution, Civil Rights and Civil Liberties (November 8, 2007).

The Prison Abuse Remedies Act of 2007 proposes reasonable fixes to the PLRA that will ensure that the core of the law remains in place to weed out frivolous lawsuits, while also removing unnecessary barriers to legitimate claims. In addition, this legislation will protect children, a group that has never flooded the courts with frivolous lawsuits, from falling victim to complicated and unnecessary obstacles that the PLRA imposes.

The Prison Abuse Remedies Act of 2007 rightly proposes the repeal of the physical injury requirement of the PLRA. Under the PLRA, prisoners may not obtain compensatory damages in federal court for any mental or emotional injuries they have suffered, unless they also prove that they suffered a physical injury. As a result, in some (but not all) courts, prisoners who have been sexually assaulted have been barred from receiving monetary damages against those responsible because courts have found that they suffered no 'physical injury.' Other forms of abuse, such as uninhabitable, unsanitary conditions and degrading treatment, also do not meet the "physical injury" requirement of the PLRA. Many other constitutional violations also do not result in

physical injuries, and many courts have denied prisoners remedies for violations of their First Amendment rights to freedom of religion or racial discrimination. Attached as **Appendix Two** is a list of some egregious examples of cases that did not meet the physical injury requirement.

One of the most damaging provisions of the PLRA is the requirement that a prisoner must fully "exhaust administrative remedies," or file a complaint at every level of the prison grievance system in accordance with the prison's time limits and other technical requirements, before filing a lawsuit in federal court. While it is important for prison officials to be alerted to problems in their facilities, there are countless instances in which prisoners are unable to complete the grievance process in the time permitted. Attached as **Appendix Three** is a chart of grievance deadlines for each state's prison grievance process. In many cases, prisoners have been barred from bringing meritorious claims because they were mentally or emotionally unable to file a grievance within the limited timeframe, did not know how to navigate the grievance system, lacked faith in the internal grievance process to resolve their problems based on previous experiences, or feared retaliation for filing internal grievances.

Too often, cases are dismissed for failure to exhaust without any review of the merits. In order to better illustrate what it means to "exhaust administrative remedies" in prison, **Appendix Four** outlines the grievance policies for three different state prison systems. As an example of courts' dismissals for failure to exhaust, **Appendix Five** is a list of nearly one hundred cases dismissed in the 9th Circuit between July 2007 and March 2008 for failure to exhaust. And **Appendix Six** is a sampling of actual grievances that were denied unfairly by prison officials. These grievances illustrate a very real problem with the PLRA's exhaustion requirement; the requirement often does not encourage prison officials to address and resolve meritorious claims. Instead, it frequently encourages the opposite because it allows officials to use procedural defaults and technical mistakes as an end-run around dealing with the real problems prisoners face. Below we discuss the substance of these grievances:

1. A Spanish-speaking prisoner, in a federal prison, alleged he had been waiting more than a year to take English classes and filed a grievance requesting that he be permitted to take the course. His appeal was denied, with this written response: "Write this to me in English and I will respond to you."

2. A prisoner in New York claimed he lost the ability to use his arm due to polio. He formally requested a sink in his unit that would be accessible to him given his disability so that he could wash himself properly. His grievance was denied, and he was told that the "Current sink is sufficient to attend to personal hygiene." No direct mention was made of his handicap.

3. A Pennsylvania prisoner filed a grievance claiming he was harassed by officers. He made several spelling and grammatical errors in his grievance form. As a result, his grievance was denied, and he was told in writing to "Please resubmit when spelled & punctuated correctly."

4. A prisoner held in a federal prison, filed numerous grievances about the overcrowding in his unit. He alleged that there were three men assigned to every two-man cell, causing the unit to be over-populated by one hundred prisoners. Though this problem was ongoing, his repeated appeals were consistently denied as "untimely." In written decisions, the appellate offices said he did not file his grievances within the twenty (20) day time limit, notwithstanding the fact that the unit was continuously overcrowded.

Essentially what the PLRA has accomplished with the exhaustion requirement is a delegation of federal authority to prison officials so that they decide who gets access to federal court and who is barred at the courtroom door. Given that prison officials are the potential subject of prisoner civil rights suits this delegation is contrary to our federal system of checks and balances and to basic principles of justice. Simply put, the PLRA erroneously allows prison officials to make the rules about who can go to federal court to protect their constitutional rights.

The fix to the exhaustion requirement proposed in the Prison Abuse Remedies Act of 2007 strikes the balance between appropriately notifying prison officials of problems inside their facilities, and ensuring that prisoners' legitimate claims can still reach the federal courts.

Organizations and Individuals Supporting Written Testimony by the Coalition To Stop Abuse and Violence Everywhere

ACLU
Bazelon Center for Mental Health Law
Call To Do Justice
Center for Children's Law and Policy
Church of Scientology, Washington DC
Correctional Association of New York
Criminon New Life DC
Florida Justice Institute, Inc.
Inmate Legal Forms Service, Inc.
Keene, David, American Conservative Union *(Institutional Affiliation for Identification Purposes Only)*
Kupers, Terry A., M.D., M.S.P., The Wright Institute *(Institutional Affiliation for Identification Purposes Only)*
Justice Policy Institute
Lewisburg Prison Project
Mushlin, Professor Michael B., Pace Law School, White Plains, New York *(Institutional Affiliation for Identification Purposes Only)*
National African-American Drug Policy Coalition, Inc.
National Juvenile Justice Network
Penal Reform International
Prison Law Office
Prison Legal News
Prison Legal Services of Michigan, Inc.
Prisoners' Rights Project of the New York City Legal Aid Society
Public Justice Center
The Sentencing Project
Giovanna Shay, Western New England College School of Law (*Institutional Affiliation for Identification Purposes Only)*
Stop Prisoner Rape
Texas Civil Rights Project
Uptown People's Law Center

APPENDIX I

SAVE: COALITION TO STOP ABUSE AND VIOLENCE EVERYWHERE

REFORM THE PRISON LITIGATION REFORM ACT:

TOP 10 HARMFUL EFFECTS OF THE PLRA ON RELIGIOUS FREEDOM

1. Prison officials confiscated two bibles from a prisoner. When the bibles were not returned, he filed a *pro se* suit alleging that officials had unlawfully withheld religious materials. The court dismissed the suit, finding that he had failed to exhaust administrative remedies only because his grievances did not explicitly state that the deprivation of his bibles impeded his ability to practice his religion.

2. Prison officials refused to comply with a Jewish prisoner's request for Kosher meals. A jury awarded the man damages for the violation of his religious rights. But the appellate court threw out the award because forcing a man to violate his religious beliefs did not meet the PLRA's "physical injury" requirement.

3. A Jewish prisoner claimed that the prison's grooming, housing, and food policies made it impossible to observe the Sabbath and other religious beliefs. The court dismissed his suit without an evidentiary hearing, because there was no "physical injury," as required by the PLRA.

4. A Christian prisoner alleged that a prison rule prohibiting outgoing funds of more than $30 impeded him from practicing his religious belief in tithing. The court dismissed his *pro se* suit because he had submitted grievances (true?) but had not submitted a specific Religious Accommodation Request Form.

5. A Jewish prisoner who had been prohibited from participating in Jewish services won his suit before a jury in the district court. The court found that non-exhaustion was excusable because prison officials had effectively prevented the inmate from pursuing the grievance process. Prison officials had repeatedly told him that "Jewish consultants" were responsible for deciding who could participate in Jewish services and holidays, not the officials who adjudicated the grievance process. Nevertheless, the court of appeals threw out the award, finding that the inmate had failed to exhaust his administrative remedies as required by the PLRA.

6. A *pro se* prisoner alleged that prison official's refusal to schedule his religious services caused him "migraines, insomnia, cramps and nervous problems." The court dismissed his case under the PLRA's "physical injury" requirement on the theory that only expert testimony could establish the connection between his injuries and the prison's denial of religious services.

7. An Orthodox Jewish prisoner alleged in a *pro se* complaint that prison officials refused to allow him to attend Jewish services and celebrate Passover because he was, "not Jewish enough." He had properly filed a special religious accommodation form, which subsequently went missing from his file. The court held that he had not exhausted his administrative remedies because he failed to re-file the special form that he had correctly filed in the first place.

8. The court dismissed a Muslim inmate's claims that a prison failed to accommodate his religious diet because he failed to exhaust administrative remedies. The court refused to excuse non-exhaustion even though the prison officials had refused to process the prisoner's grievances because he used his legally changed religious name rather than the name that was on file with corrections officials. The court also found that post-traumatic stress disorder and weight loss due to an inadequate diet did not satisfy the PLRA physical injury requirement for compensatory damages.

9. Twenty-six members of the Nation of Islam protested the appointment of an "outside minister" who was neither a member of the their religion nor a follower of the teachings of that religion. Prison officials conceded on appeal that the prisoners' First Amendment rights had been violated, but the court held that an individual prisoner's claim for compensatory damages was barred because he had not met the PLRA requirement of physical harm.

10. In a suit for an alleged free exercise of religion violation, the court noted that in general, even though the Religious Land Use and Institutionalized Persons Act (RLUIPA) would allow a prison inmate to recover monetary damages when his Free Exercise Rights have been violated, the PLRA's physical injury requirement would effectively prevent an inmate from recovering anything but nominal damages (usually $1) for a violation of religious rights.

REFERENCES

1. Dye v. Kingston, 2005 WL 1006292 (7th Cir. Apr. 27, 2005) (Nonprecedential Disposition) (42 U.S.C. 1997e(a)).

2. Searles v. Van Bebber, 251 F.3d 869 (10th Cir. 2001) (42 U.S.C. 1997e(e)).

3. Massingill v. Livingston, 2006 WL 2571366 (E.D. Texas Sept. 1, 2006) (42 U.S.C. § 1997e(e)).

4. Timly v. Nelson, 2001 WL 309120 (D. Kansas Feb. 16, 2001) (42 U.S.C. 1997e(a)).

5. Lyon v. Vande Krol, 305 F.3d 806 (8th Cir. 2002) (42 U.S.C. 1997e(a))

6. Quin'ley v. Corrections Corporation of America, 2007 WL 1101285, No. 2:05CV190-P-D (N.D.Miss Feb. 23, 2007) (42 U.S.C. 1997e(e)).

7. Wallace v. Burbury, 305 F.Supp.2d 801 (N.D. Ohio 2003). (42 U.S.C.A. 1997e(a)).

8. Al Ghashiyah v. Wisconsin Department of Corrections, 2006 WL 2845701 (E.D.Wis. Sept. 29. 2006). (42 U.S.C. 1997e(a), (e)).

9. Allah v. Al- Hafeez, 226 F.3d 247 (3rd Cir. 2000) (42 U.S.C. § 1997e(e)).

10. Smith v. Allen, 2007 WL 2826759, No. 05-16010 (11th Cir. Oct. 2, 2007) (42 U.S.C. § 1997e(e)).

REFORM THE PRISON LITIGATION REFORM ACT

TOP 10 HARMFUL RESULTS FROM THE PLRA'S 3-STRIKES PROVISION

1. HIV positive inmate files suit alleging that prison officials have denied him access to an HIV doctor and proper medical care. He claims to suffer from internal bleeding. The court applies the Three Strikes rule and denies the man's request to proceed *in forma pauperis*. The court determines that the lack of an HIV doctor and the physical injury that could arise from internal bleeding do not put the inmate in "imminent danger of serious physical harm." The court refuses to grant an exception to the Three Strikes rule due to "imminent danger" of physical injury because the prisoner had already lived with the condition for two years.

2. After being held in segregation confinement for over seven years, an inmate files a lawsuit alleging violations of his constitutional rights. The court dismisses his complaint under the three strikes provision because three of his prior lawsuits have been dismissed for failure to state a claim and confinement in segregation does not create imminent danger of physical harm.

3. A prisoner's complaint alleges that defendants maced him and shot him with plastic pepper-ball bullets. He explains that defendants "used excessive force because they know that I [can] not file anymore lawsuits because of my three strikes." The court dismisses the complaint concluding that the alleged excessive force and inadequate medical treatment were past events that do not show that the inmate is in imminent danger of physical harm.

4. A prisoner files a complaint alleging verbal and physical sexual harassment by a corrections officer. The court dismisses the claims, concluding that, "grabbing of the plaintiff's private parts more than (1) week prior to the complaint" did not meet the imminent danger exception because the danger of injury has to exist at the time the complaint is filed and verbal harassment presents no danger of physical injury. The court denies *in forma pauperis* status and dismisses complaint.

5. The court dismisses a prisoner's claim that officers unlawfully seized his legal and religious materials. The court finds that the allegation of unlawful confiscation of religious materials does not meet the imminent danger exception to the Three Strikes provision.

6. A prisoner's complaint alleges that he was "assaulted, hit with a rope ... dragged into a 'freezing cold cell' naked, and denied meals and medication for his injury," and that staff, "called him names, spit on him and put glass and human waste in his food, causing him to become sick over (40) times." The court dismisses the complaint under the three strikes rule because the prisoner had been transferred to another facility when he filed the complaint and therefore did not meet the imminent danger exception.

7. The prisoner's complaint alleges that he is denied access to drinking water and that his cell is infested with bugs. He alleges that two of the windows are broken, but in the cold of the winter the inmates are only given one blanket and no sheets. He alleges that staff responds to written grievances with physical and verbal threats. The court determines that while the conditions are unpleasant, the prisoner is not in imminent danger of physical harm because "the imminent danger must exist at the time the complaint ... is filed, not when the alleged wrongdoing occurred."

8. A prisoner alleges unsanitary, inhumane living conditions, including the flooding of his cell with raw sewage from overflowing toilets at least three times a week, and sewage leaking from the ceiling on to his desk, sink, bed, and other property. He further alleges that he has experienced intestinal and respiratory ailments and skin rashes as a result of these conditions. The court determines that the prisoner's allegations of "minor discomforts and unpleasant conditions" do not establish that he is in imminent danger of serious physical injury and therefore applies the Three Strikes rule.

9. A prisoner claims that prison officials deprived him of any treatment and medication for his Post Traumatic Stress Disorder for two years. The suit was dismissed under the three strikes provision, even though the prisoner claimed that his "multiple disabilities and disorders" have prevented him from properly articulating his federal claims.

10. A prisoner alleges that prison officials failed to provide him with Tuberculosis medication for over five years. But the court says that he failed to demonstrate imminent danger and dismisses the case under Three Strikes. The court reasons that, "the lengthy, and perhaps chronic, nature of his complaint leaves little doubt that the injury, if any, to him, is not imminent."

1. Gilmore v. Wright, 2007 WL 2564702 (D.S.C. Aug. 14, 2007).

2. Bowler v. Ray, 2007 WL 1725354 (W.D. VA. June 13, 2007).

3. Smith v. Wilson, 2007 WL 2903197 (N.D. Ind. Oct. 1, 2007).

4. Maxton v. Quick, 2007 WL 1486142 (D.S.C. May 18, 2007).

5. Kelly v. Webb, 2007 WL 2021340 (E.D.Tex. Jul. 9, 2007).

6. Todd v. Kyler, 2007 WL 1031353, (M.D. Pa. Mar. 29, 2007).

7. Radford v. Lucas, 2007 WL 2021973 (W.D. Ark. Jul. 9, 2007).

8. Censke v. Smith, 2007 WL 2594539 (W.D. Mich. Sept. 4, 2007).

9. Baskett v. Department of Corrections, 2007 WL 1302719 (E.D. Wash. May 2, 2007)

10. Staley v. Smalley, 2007 WL 2283647 (D.S.C. Aug. 6, 2007).

APPENDIX II

SAVE: Coalition to Stop Abuse and Violence Everywhere

Top Harmful Results of the "Physical Injury" Requirement of the PLRA

1. Two men were forced to spend twenty-four hours in an isolation cell meant for one person. The cell did not have a toilet but had a drain that could be flushed from outside the cell by the guards. The drain became clogged with the men's feces. They attempted to unclog it using a paper plate but the drain became more clogged. When the men tried to urinate in the drain their urine splattered on the walls of the cell. At one point one of the men became nauseous from the smell and attempted to vomit in the drain. The men requested help from the guards repeatedly. The guards attempted to flush the drain but it did not work. The guards then sprayed water into the cell through an opening at the bottom of the door. This only served to spread the sewage throughout the cell. The men requested a mop but were never given one. The men had to eat lunch and dinner in the cell and were provided no means of washing their hands or their eating utensils. The court held that whether or not there was an Eighth Amendment violation the men could not recover because they did not have a physical injury.

2. A guard attacked a man. During the attack the man was struck in the head with an iron bar, punched in the back and had his neck twisted. The court, while acknowledging that it was unfortunate that force was used against the man, held that the injuries he sustained were *de minimis* and dismissed the suit under the PLRA.

3. A man injured his teeth. The nurse who attended him noticed that he had a jaw injury and recorded that he stated his pain was a 10 on a scale of 1 to 10. The nurse added him to a list of patients to be seen by a dentist. Even though the man had two broken teeth and an exposed nerve, no dentist saw him for nearly 3 weeks. The court dismissed the claim for lack of physical injury.

4. Prisoners were forced to stand in the exercise yard in the rain while the prison was searched. They were then forced to stay in the dining hall for twelve hours and were not permitted to use the bathroom. The men were given a bucket to urinate in but had nowhere to defecate. One man defecated on himself and was then forced to sleep in his own feces. The court stated that the plaintiff did not allege more than a *de minimis* injury and dismissed the action.

5. Prison officials took a man's epilepsy medication and refused to return it. The court dismissed the lawsuit partially due to a lack of "physical injury."

6. A man was placed for seven days in a holding cell with only a wooden bench and no running water, toilet, sink, bed, mattress, soap or toothbrush. He was forced to urinate and defecate on the floor, in Styrofoam trays or in cups. He was not allowed to shower the entire time. The court dismissed the action due to lack of physical injury.

7. A man was arrested for theft of property and held in jail for 76 days before he was brought before a judge for his first appearance. The court cited *Hayes v. Faulkner County* where the court found that failing to take a defendant before a judge for 38 days "shocks the conscience." But the court held the man could receive only nominal damages because he had no suffered physical injury.

8. A man pled guilty to resisting arrest and was sentenced to one day in jail and given credit for time served. County officials were then directed to transfer him to another county in response to a writ issued for him. Before the transfer took place, officials lost the man's transfer order and the man was held unlawfully for four months. Court held that the man's claim was barred because he did not have a physical injury.

References

1. *Alexander v. Tippah County Mississippi, 351 F.3d 626 (5th Cir. 2003).* This case was decided at summary judgment, which means that all the facts were assumed in favor of the plaintiffs; there were no findings of fact because the suit was dismissed prior to trial.

2. *Wallace v. Brazil, No. 7:04-CV-187-R, 2005 WL 4813518 (N.D. Tex. 2005).* This case was decided at summary judgment, which means that all facts were assumed in favor of the plaintiff; there were no findings of fact because the suit was dismissed prior to trial.

3. *Giddings v. Valdez, No. 3:06-CV-2384-G, 2007 WL 1201577 (N.D. Tex. 2007).* This case was dismissed with prejudice as frivolous after a screening by a magistrate judge in accordance with 28 U.S.C. § 1915A(b); there were no findings of fact because the suit was dismissed prior to trial.

4. *Brooks v. Delta Correctional Facility, No. 4:07CV107-P-B, 2007 WL 2219383 (N.D. Miss. 2007).* This case was dismissed for failure to state a claim upon which relief could be granted; there were no findings of fact because the suit was dismissed prior to trial.

5. *Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002).* This case was dismissed for failure to state a claim upon which relief could be granted; there were no findings of fact because the suit was dismissed prior to trial.

6. *Lopez v. S.C.D.C., No. 3:06-2512-PMD-JRM, 2007 WL 2021875 (D.S.C. 2007).* This case was dismissed for failure to state a claim upon which relief could be granted; there were no findings of fact because the suit was dismissed prior to trial.

7. *Scott v. Belin, No. 1:05-cv-01100, 2007 WL 2390383 (W.D. Ark. 2007).* This case was decided at summary judgment, which means that all the facts were assumed in favor of the plaintiff, but there were no findings of fact because the suit was dismissed prior to trial.

8. *Colby v. Sarpy County, No. 8:04CV52, 2006 WL 519396 (D. Neb. 2006).* This case was decided at summary judgment, which means that all the facts were assumed in favor of the plaintiffs, but there were no findings of fact because the suit was dismissed prior to trial.

APPENDIX III

Appendix III: Grievance Deadlines

State	Grievance Filing Deadline	Deadlines for Appeals	Number of Appeals
Alabama	policy under review		
Alaska	30 days	2 working days	1 appeal
Arizona	10 calendar days	10 days	2 appeals
Arkansas	15 days for informal grievances, 3 days from receipt of resolution of informal grievance	5 working days	1 appeal
California	15 working days	15 working days	3 appeals
Colorado	30 calendar days	5 calendar days	2 appeals
Connecticut	30 days	15 days	1 appeal
Delaware	7 calendar days	3 calendar days	1 appeal
District of Columbia	7 days for an informal resolution; 5 days from the resolution of the informal grievance, or 10 days if no response is received	5 calendar days	2 appeals
Florida	15 calendar days	15 calendar days	1 appeal
Georgia	10 calendar days for an informal grievance, 5 business days from receipt of resolution of informal grievance	5 business days	1 appeal
Hawaii	14 days	5 calendar days	1 appeal
Idaho	15 days	10 days	1 appeal
Illinois	60 days	30 days	2 appeals
Indiana	48 hours	10 working days	1 appeal
Iowa	30 days	15 days	2 appeals
Kansas	15 days	3 days	2 appeals
Kentucky	5 working days	3 working days	2 appeals
Louisiana	30 days	5 days	1 appeal
Maine	15 days	10 days	2 appeals
Maryland	15 calendar days	10 calendar days	1 appeal
Massachusetts	10 working days	10 working days	1 appeal
Michigan	2 days to resolve with staff, 5 business days after attempt to resolve with staff	10 working days	2 appeals
Minnesota		15 working days	1 appeal
Mississippi	30 days	5 days	1 appeal
Missouri	5 working days after completion of the informal grievance	5 working days	2 appeals
Montana	3 days after completion of the informal grievance	3 working days	1 appeal
Nebraska	15 days after completion of the informal grievance		1 appeal
Nevada	25 days	5 calendar days	1 appeal
New Hampshire	30 days	30 days	1 appeal
New Jersey		10 working days	1 appeal

New Mexico	20 calendar days	7 days	1 appeal
New York	21 days	4 days	2 appeals
North Carolina	1 year	15 days	1 appeal
North Dakota	5 days to mandatory informal grievance. 15 from incident for formal grievance	5 days	1 appeal
Ohio	14 calendar days from informal grievance	14 calendar days	1 appeal
Oaklahoma	Must file informal grievance in 3 days. 15 days to formal grievance	15 calendar days	1 appeal
Oregon	30 days	14 days	1 appeal
Pennsylvania	15 working days	10 working days	2 appeals
Rhode Island	3 days	3 working days	3 appeals
South Carolina	15 days	5 calendar days	1 appeal
South Dakota	5 working days from informal resolution	10 days	1 appeal
Tennessee	7 calendar days	5 calendar days	2 appeals
US Bureau of Prisons	20 calendar days	20 calendar days to the Regional Director. 30 calendar days to the General Counsel	2 appeals
Utah	7 working days	5 working days	2 appeals
Vermont	14 business days	10 business days	1 appeal
Virginia	30 calendar days	20 calendar days	1; 2 if approved
Washington	20 business days	2 business days	3 appeals
West Virginia	15 days	5 working days	2 appeals
Wisconsin	14 calendar days	10 calendar days	2 appeals
Wyoming	30 calendar days	10 calendar days	1 appeal

**Sources: the information collected here was obtained through Yale Law School's Williams v Overton webpage, available online at: http://www.law.yale.edu/academics/williamswaltonjones.asp. Additional information was obtained directly through each state's respective Department of Corrections.

APPENDIX IV

What it means to "exhaust administrative remedies" behind bars

Most grievance systems have a three-tiered process. First, a prisoner must try to resolve the matter informally. Second, with proof that informal attempts were made but unsuccessful, the prisoner must file a formal grievance. Finally, when the grievance is rejected, the prisoner must appeal that decision. Each of these steps comes with its own deadlines and requirements. The slightest misstep at any stage will result in the grievance being rejected and the prisoner foreclosed from any judicial review.

The following is a sample of state policies and the unnecessary barriers posed for prisoners in those jurisdictions:

California: Unlike most systems, the California Department of Corrections and Rehabilitation uses the same procedure for grieving conditions as it does for challenging other decisions, such as disciplinary infractions. *See* Cal. Code of Regs. § 3084.1. This process includes an additional appeal, so prisoners must navigate four levels to fully exhaust.

California's informal process requires bringing the complaint directly to staff involved. Cal. Code of Regs. 3084.5(1). This level can be waived when "exceptional circumstances" exist. § 3084.5(a)(3)(E). These circumstances are limited to emergencies that "may result in a threat to the appellant's safety or cause other serious and irreparable harm." Cal. Code of Regs. § 3084.7(a)(1).

The first formal level requires submitting a grievance form within fifteen working days of the incident to the appeals coordinator. Cal. Code of Regs. § 3084.6(c). A prisoner must lodge his or her complaint on a particular form (CDC Form 602) and attach no more than one page (front and back) to provide more information. Cal. Code of Regs. § 3084.2(a). These technical requirements make it especially difficult for a prisoner to ensure that all of the relevant information is provided to authorities, particularly if he or she has limited literacy and/or suffers from mental illness.

Once receiving a decision on the first formal level, a prisoner has 15 working days to initiate the second formal level, review by the institution head. Cal. Code of Regs. § 3084.5(c). If unsatisfied with the second formal level decision, the prisoner again has fifteen working days to seek a third level formal review, a decision from their Director. Cal. Code of Regs. § 3084.5(d). The policy specifies no distinction between these appeals. As a result, these reviews are more likely to cause a prisoner to miss a deadline, or otherwise not comply with a technical requirement, rather than provide any meaningful decision.

Filing more than one non-emergency appeal per week is considered excessive, and will result in the suspension of non-emergency appeals. Cal. Code of Regs. § 3084.4(a). A prisoner who files two or more complaints in one week will be limited to one appeal per month for six consecutive months. Cal. Code of Regs. § 3084.4(a). Aside from circumstances that could give rise to an emergency appeal (i.e., threat to safety or other

serious or irreparable harm), a prisoner cannot challenge this decision. As a result, a prisoner who is subject to frequent retaliation – and complains about this retaliation – may be limited in his or her ability to access the grievance system.

Ohio: An Ohio prisoner has only 14 calendar days to file an informal complaint to the direct supervisor of the staff member or department most directly responsible. Ohio Admin. Code § 5120-9-31(J)(1). While a response should be provided within seven calendar days, if it is not, the prisoner must wait an undefined "reasonable time" to contact the inspector of institutional services. *Id.* The policy does not specify any instance where the informal process can be bypassed, except if the complaint is against the warden or inspector of institutional services. Ohio Admin. Code § 5120-9-31 (K). As a result, a prisoner may not be able to complain about employee misconduct and abuse without further jeopardizing his or her safety.

Within 14 calendar days from the informal complaint response, the prisoner must file a notification of grievance form. Ohio Admin. Code § 5120-9-31(J)(2). Similar to California, Ohio has a specified grievance form, which the prisoner must obtain from the inspector of institutional services *Id.* While the inspector can extend the time for filing for good cause, *id.*, the policy provides no accommodation for prisoners who are unable to obtain this form.

If dissatisfied with the response to the grievance, the prisoner must appeal within 14 days of the disposition. Ohio Admin. Code § 5120-9-31(J)(3). This stage also requires completing a specified form which the prisoner must request from the inspector of institutional services. *Id.*

A prisoner found to have abused or misused the grievance process can be barred from filing a complaint for 90 days, subject to extensions if the prisoner does not substantially comply with the restrictions. Ohio Admin. Code § 5120-9-31(E). Restricted prisoners can grieve only issues pertaining to a substantial risk of physical injury. *Id.* Similar to California, there is no appeals process to challenge this restriction within the policy.

Oklahoma: In addition to the strict time limitations and three step process common to most grievance systems, Oklahoma places additional requirements on a prisoner challenging unconstitutional conditions, most notably a fee for emergency grievances and on appeals.

Oklahoma's informal resolution process includes two steps: speaking with the appropriate staff member within three days of the incident and filing a "Request to Staff" to the appropriate staff within seven days of the incident. Oklahoma Department of Corrections Policy OP-090124 § IV (6/29/05) ("OP-090124"). This written request should be responded to within 10 working days of the receipt of the request. OP-090124 § IV.B (3). If there is no response after 30 days, a prisoner may file a formal grievance with evidence that the Request to Staff was submitted to the proper staff member. OP-090124 § IV.B (6).

Complaints "of a sensitive nature or when a substantial risk of personal injury or other irreparable harm exists" can bypass the informal resolution stage through an emergency grievance process. OP-090124 § VIII.A. Prisoners must pay $2 to use this emergency process. OP-090124 § VIII.A (1). As most prison jobs result in just pennies a day of income – and some of the most vulnerable prisoners are those unable to work – it could take months to acquire $2 in one's commissary account. The policy does not specify what type of proof is needed to establish the risk of personal injury or irreparable harm and, without any guidance, authorizes the reviewing authority to determine that the grievance is not of a sensitive or emergency nature. When determining that the grievance does not belong in the emergency process, the official returns it to the prisoner to utilize the standard grievance procedure, OP-090124 § VIII.C, but there is no provision to extend the time for a prisoner to seek informal resolution, making it virtually impossible to meet the deadline.

The formal grievance process begins with the filing of a Prisoner/Offender Grievance Report Form, with the Request to Staff attached. OP-090124 § V.A The grievance must be written in blue or black ink, and will be rejected if in pencil regardless of what writing materials are available. OP-090124 § II.H. The deadline for this grievance is 15 calendar days from the incident or from the date of the response to the Request to Staff form, whichever is later. OP-090124 § V.A(1). While the policy says that the reviewing authority "may choose to extend the submitting period up to 60 days for good cause," OP-090124 § V.A(2), there is no obligation to extend the period, nor are there any guidelines for when such good cause is met. A grievance cannot be accepted after 60 days, unless ordered by a court, the director, chief medical officer, or their designee. OP-090124 § V.A (3).

Within fifteen calendar days of the reviewing authority's response, the prisoner must appeal to the administrative review authority or chief medical officer. OP-090124 § VII.B. Once again, prisoners are charged $2 per grievance appeal, OP-090124 § VII.B.(1), forcing a prisoner to choose between challenging unconstitutional conditions and purchasing basic living needs such as toiletries and food.

Grievances submitted outside of these short deadlines are returned unanswered, unless there is "substantial evidence" that the untimeliness was through no fault of the prisoner. OP-090124 II.C, XII.C; No one else can submit a grievance on behalf of an prisoner.

Prisoners who are found to have "abuse[d] the grievance process." OP-090124 § IX, can be restricted from filing grievances for up to one year. OP-090124 § IX.B (1). The guidelines for establishing when an prisoner has abused the process are vague and overly broad. For example "repetitive grievances by multiple prisoners/offenders about the same issue" is considered a ground for abuse, Op-090124 § IX.A(1) (e), without regard to whether it is a systemic problem affecting many prisoners. There is also no definition of the number of grievances needed to constitute "repetitive" for these purposes. Likewise, it considers grievances about "de minimus ... issues" abusive, without explaining what type of issue, which an prisoner deems important enough to attempt to navigate the grievance process and possibly pay up to $4 would meet this standard.

APPENDIX V

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

Cases in the 9th Circuit Dismissed for a Failure to Exhaust Under the PLRA:

July, 2007 - February, 2008

No.	Case	Court	Cite	Date	Description
1	Jackson v. Andreasen	E.D. Cal.	2008 WL 649782	3/6/2008	Dismissed for non-exhaustion-Plaintiff filed a grievance about the prison doctor's lack of a license to practice medicine and management's failure to investigate his unlicensed practice of medicine. But his claims based on failure to train and supervise the doctor, and alleged acts of retaliation in covering up the doctor's practice of medicine without a license, were not sufficiently alleged in his grievance. Therefore, his suit is dismissed.
2	Benge v. Arpaio	D. Ariz.	2008 WL 628912	3/5/2008	Dismissed for non-exhaustion. Plaintiff's argument that no remedy was available because he had already been assaulted is rejected.
3	Motley v. Figgennattia	E.D. Cal.	2008 WL 590630	2/29/2008	Routine dismissal for non-exhaustion
4	Bairfield v. Solano County Sheriff's Dept.	E.D. Cal.	2008 WL 564830	2/28/2008	Where defendants said plaintiff didn't exhaust, and plaintiff contradicted himself, the court "resolves" this factual dispute under Wyatt v. Terhune against the plaintiff.
5	Harrison v. Williams	E.D. Cal.	2008 WL 552430	2/27/2008	Routine dismissal for non-exhaustion.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

6	Allah v. California Dept. of Corrections	E.D. Cal.	2008 WL 552442	2/27/2008	Plaintiff can't amend to add claims that accrued after his original complaint because it would "thwart the mandate" of the exhaustion requirement.
7	Richardson v. Dauth	W.D. Wash.	2008 WL 536622	2/26/2008	Routine partial dismissal for non-exhaustion.
8	Carter v. Butler	E.D. Cal.	2008 WL 544511	2/26/2008	Routine partial dismissal for non-exhaustion.
9	Gordon v. Barnett	W.D. Wash.	2008 WL 539819	2/21/2008	Routine partial dismissal for non-exhaustion.
10	Saunders v. Lowrimore	E.D. Cal.	2008 WL 447649	2/15/2008	Routine dismissal for non-exhaustion; he did not complete the process before filing suit, 27 days after the event.
11	Ali v. County of Sacramento	E.D. Cal.	2008 WL 449660	2/15/2008	Routine dismissal for non-exhaution.
12	Keeton v. Forsythe	E.D. Cal.	2008 WL 436945	2/14/2008	Plaintiff's grievance was rejected on the ground that the writing was too small to read, and he was instructed to resubmit it. He complained that the rejection of the grievance was retaliatory and he didn't resubmit it. Dismissed for non-exhaustion.
13	Hebner v. O'Neill	N.D. Cal.	2008 WL 413731	2/13/2008	One of plaintiff's grievances was "screened out because it concerned an anticipated action or decision, specifically, a health care transfer decision that had not yet occurred." Since it was procedurally improper, plaintiff didn't exhaust.
14	Crowe v. Williams	D. Or.	2008 WL 410100	2/12/2008	Routine dismissal for non-exhaustion.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

15	El-Shaddai v. Wheeler	E.D. Cal.	2008 WL 410711	2/12/2008	The plaintiff's grievance and appeals adequately describe a problem involving the use of excessive force by particular guards and don't adequately suggest that any other guards were involved in the beating or the failure to protect. Therefore, he failed to exhaust with respect to his claims against two officers not named in the grievance.
16	Perkins v. Kernan	E.D. Cal.	2008 WL 356961	2/8/2008	Routine dismissal for non-exhaustion-plaintiff didn't finish before filing suit.
17	Thomas v. Belleque	D. Or.	2008 WL 362679	2/8/2008	Routine dismissal for nonexhaustion (untimely grievance).
18	Hernandez v. High Desert State Prison	E.D. Cal.	2008 WL 364767	2/8/2008	Routine dismissal for non-exhaustion-plaintiff didn't finish before filing suit.
19	Tatum v. Piller	E.D. Cal.	2008 WL 346383	2/6/2008	Grievance described with sufficient particularity the complaint that the plaintiff and other prisoners were having problems accessing the law library. However, because some of the events underlying the plaintiff's First Amendment claims fall outside of the date range addressed in the grievance, the plaintiff is barred from proceeding on those claims.
20	Anderson v. Mendoza	E.D. Cal.	2008 WL 314612	2/4/2008	Dismissed for non-exhaustion.
21	Haghighi v. Snohomish County	W.D. Wash.	2008 WL 336818	2/4/2008	Routine dismissal for non-exaustion.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

22	Townsel v. Quinn	W.D. Wash.	2008 WL 650284	1/24/2008	Partly dismissed for non-exhaustion; plaintiff didn't file a grievance about a particular part of his complaint about inadequate treatment for a hand injury.
23	Harris v. Arpaio	D. Ariz.	2008 WL 190399	1/18/2008	Partial dismissal for non-exhaustion.
24	Williams v. Oregon	D. Or.	2008 WL 200280	1/18/2008	Routine dismissal for non-exhaustion; the court doesn't believe the plaintiff filed grievances he has no evidence of and defendants don't acknowledge receiving, and other grievances that clearly were pursued don't address the problem he asserts here.
25	Rally v. Whorton	D. Nev.	2008 WL 205215	1/18/2008	Routine dismissal for non-exhaustion.
26	Mency v. Duc	E.D. Cal.	2008 WL 171012	1/18/2008	Partly dismissed for non-exhaustion because plaintiff omitted one page of a document that he was supposed to submit with his appeal, and did not resubmit it after being told of the problem.
27	Valdez v. Tilton	N.D. Cal.	2008 WL 142400	1/14/2008	Dismissed for non-exhaustion. Plaintiff didn't take the final appeal, and the court doesn't buy his argument that it was a disciplinary matter and he didn't have to take the final appeal, since he explicitly clarified his grievance to be a challenge to the policy under which he was disciplined, which would call for the final appeal.
28	Hysell v. Piller	E.D. Cal.	2008 WL 149961	1/14/2008	Defendants said plaintiff didn't exhaust against a particular defendant, but didn't specify which claims they were talking about, so the court looks at the claims in a general way. Some claims dismissed for non-exhaustion.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

29	Worley v. Arizona Dept. of Corrections	D. Ariz.	2008 WL 169744	1/14/2008	Plaintiff didn't exhaust properly. The court finds the facts against the plaintiff under the 9th Cir motion in abatement procedure because the documents don't support the plaintiff's factual allegations.
30	Cohea v. Salter	E.D.Cal	2007 WL 4404440	12/13/2007	Court rejected Plaintiffs claim that his grievance was lost because he did not submit any evidence to support it.
31	Cohen v. Nevada	D.Nev.	2007 WL 4458174	12/13/2007	Routine dismissal for non-exhaustion
32	McCollum v. California	N.D. Cal.	2007 WL 4390616	12/13/2007	Routine dismissal for non-exhaustion
33	Jackson v. Parks	E.D. Cal.	2007 WL 4277572	12/4/2007	Routine dismissal for non-exhaustion
34	Cameron v. Allen	M.D. Ala.	2007 WL 4246145	12/4/2007	Routine dismissal for non-exhaustion
35	White v. Director of Corrections	E.D. Cal.	2007 WL 4210405	11/28/2007	Routine dismissal for non-exhaustion
36	Kritz v. Arpaio	D. Ariz.	2007 WL 4150274	11/19/2007	Routine dismissal for non-exhaustion
37	Stanley v. Baker	E.D. Cal.	2007 WL 4170709	11/19/2007	Routine dismissal for non-exhaustion

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

38	Young v. Transportation Deputy Sheriff I	E.D. Cal.	2007 WL 4171213(	11/19/2007	Plaintiff claimed greivance was improperly screened out but did not submit any evidence to support this claim so court dismissed claim.
39	Warren v. Ryberg	E.D. Cal.	2007 WL 3407356	11/14/2007	Plaintiff claimed he had filed third level appeal but did not provide proof of doing so. Court dismissed for non-exhaustion.
40	Whitney v. Simonson	E.D. Cal.	2007 WL 3274373	11/5/2007	Because Plaintiff filed a new grievance, about the same issue, instead of appealing his current grievance the court held he failed to exhaust.
41	Holcomb v. Fleeman	E.D. Cal.	2007 WL 3231588	10/30/2007	Plaintiff did not wait for final decision before filing an appeal. Even though there was a slight delay on the prison's part the Plaintiff still should have waited. Court held he did not exhaust.
42	Rivera v. Golla	W.D. Wash.	2007 WL 3353458	10/4/2007	Plaintiff argued his claim was not grievable due to staff corruption. The court held that there was no such exception to the PLRA.
43	Marshall v. Kubitz	N.D. Cal.	2007 WL 2726855	9/17/2007	Court rejected Plaintiff's argument that he exhausted by "alternative means" when the normal procedure was available. The court also held that intervention in a first-level appeal does not excuse failure to file a second or third level appeal.
44	Freeman v. California San Quentin State	N.D. Cal.	2007 WL 2702981	9/14/2007	Plaintiff failed to exhuast and his explanation did not fall under one of the exceptions, therefore, the court dismissed the action.
45	Colbert v. Roman-Marin	E.D. Cal.	2007 WL 2695806	9/11/2007	Routine dismissal for non-exhaustion
46	In re Freeman	N.D. Cal.	2007 WL 2600744	9/10/2007	Routine dismissal for non-exhaustion

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

47	Fullmer v. Idaho	D. Idaho	2007 WL 2684830	9/6/2007	Nothing in record indicates Plaintiff attempted to use greivance procedure.
48	Pierson v. Shelton	M.D. Ala.	2007 WL 2609811	9/6/2007	Routine dismissal for non-exhaustion
49	Williams v. Mitchell	N.D. Cal.	2007 WL 2572162	9/5/2007	Routine dismissal for non-exhaustion
50	Blackman v. Jurado	N.D. Cal.	2007 WL 2572171	9/5/2007	Routine dismissal for non-exhaustion; grievance was incomprehensible and he didn't appeal it all the way
51	Geray v. Andrews	E.D. Cal.	2007 WL 2572247	9/5/2007	Routine dismissal for non-exhaustion
52	Brothers v. Snow	E.D. Cal.	2007 WL 2504291	8/31/2007	Partly dismissed for non-exhaustion; plaintiff didn't grieve the facts underlying the claims against two defendants.
53	Lopez v. Arpaio	D. Ariz.	2007 WL 2533163	8/31/2007	Routine dismissal for non-exhaustion
54	Fox v. Prison Health Services	D. Idaho	2007 WL 2500166	8/30/2007	Routine dismissal for non-exhaustion
55	McNeal v. Evert	E.D. Cal.	2007 WL 2462074	9/28/2007	Dismissed for non-exhaustion, filed before completing the process.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

56	Newman v. Montana Dept. of Corrections	D.Mont.	2007 WL 2461937	8/27/2007	The plaintiff originally filed with two other prisoners and the complaint said only one of the others had exhausted. The court doesn't say what happened to the others. This plaintiff is dismissed for non-exhaustion.
57	Drummonds v. Griffin	E.D. Cal.	2007 WL 2462050	8/27/2007	Dismissed for non-exhaustion (recommendation): plaintiff filed before finishing exhaustion. He said the delay wasn't his fault, but that's not the issue.
58	Burrows v. Gifford	E.D. Cal.	2007 WL 2462095	8/27/2007	Dismissed for non-exhaustion; he didn't complete the process.
59	Bachman v. Kuhn	E.D. Cal.	2007 WL 2428110	8/23/2007	Routine dismissal for non-exhaustion; plaintiff's second level appeal was dismissed as untimely.
60	Campbell v. Borges	E.D. Cal.	2007 WL 2428306	8/23/2007	Routine dismissal for non-exhaustion.
61	Birks v. Terhune	E.D. Cal.	2007 WL 2433332	8/22/2007	Partially dismissed for non-exhaustion. Plaintiff alleged that he was beaten by McGuire, denied mental health medication and other treatment by Cummings, and that warden Runnels did nothing about any of it. He filed no grievances against Cummings and Runnels and they are dismissed.
62	Coronado v. Vasques	D. Ariz.	2007 WL 2410357	8/21/2007	Dismissed for non-exhaustion. Plaintiff says that he filed grievances but none of them ever got to the grievance officer, and he saw officers ripping up grievances. However, court dismissed despite claims of grievances being thrown away because Plaintiff failed to name which officers were ripping up grievances.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

63	Patrick L. Racine v. Dora Schriro	D. Ariz.	2007 WL 2410364	8/21/2007	Dismissed for non-exhaustion.
64	Evans v. McWilliams	D. Ariz.	2007 WL 2410370	8/21/2007	Court rejected Plaintiff's argument that he did not have to exhaust because he was mentally ill.
65	Cooper v. Arpaio	D. Ariz.	2007 WL 2389820	8/20/2007	Dismissed for non-exhaustion
66	Richardson v. Llamas	E.D. Cal.	2007 WL 2389835	8/20/2007	Court held Plantiff did not exhaust because he did not cooperate with interview procedure at second-level appeal.
67	Fisher v. Gomez	E.D. Cal.	2007 WL 2390397	8/20/2007	Dismissed for non-exhaustion in renewal of a motion denied in *1998*. Plaintiff exhausted after he filed.
68	Hixon v. MCSP Admin. Office	E.D. Cal.	2007 WL 2390417	8/20/2007	Once Plaintiffs greivance was handed off to Internal Affairs Plaintiff had exhausted his administrative remedies. However, because that did not happen until after he had filed his suit he did not met the PLRA requirements.
69	Williams v. CDCR	E.D. Cal.	2007 WL 2384510	8/17/2007	The plaintiff filed suit six weeks before receiving a final decision on his grievances (doesn't say when they were due), and the court declines to recognize an emergency exception to exhaustion. Court dismisses for failure to exhaust.
70	Patton v. Johnson	E.D. Cal.	2007 WL 2384726	8/17/2007	Routine dismissal for failure to exhaust.
71	Hayes v. Milligan	E.D. Cal.	2007 WL 2345000	8/16/2007	Plaintiff failed to exhaust according to defendants' records; since it's not clear he understood his burden, the court orders him to show cause why.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

72	Brown v. Mantel	N.D. Cal.	2007 WL 2349282	8/14/2007	The grievances Plaintiff filed did not present the claim filed with the court (his lawsuit was about his inability to access his legal papers and his greivances referred only to his property or personal property). Therefore, the court dismissed the action for failure to exhaust.
73	Glick v. Montana Dept. of Corrections	D. Mont.	2007 WL 2359776	8/14/2007	Plaintiff filed before exhaustion was completed and asked for a preliminary injunction, stating he wasn't asking for a permanent injunction until he finished exhaustion but just seeking to avoid irreparable harm. The court says exhaustion has to be done before filing without specifically commenting on the irreparable harm argument or addressing the authority that allows preliminary relief pending exhaustion.
74	Bland v. Snohomish County	W.D. Wash.	2007 WL 2363040	8/14/2007	Routine dismissal for non-exhaustion
75	Washington v. Alexander	E.D. Cal.	2007 WL 2326083	8/13/2007	Dismissed for non-exhaustion; defendants submit unspecified evidence that plaintiff didn't exhaust, and he presents no evidence.
76	Carrasco v. Arpaio	D. Ariz.	2007 WL 2332576	8/13/2007	Dismissed for non-exhaustion
77	Davis v. Knowles	E.D. Cal.	2007 WL 2288317	8/8/2007	The court in effect holds once again that exhausted claims cannot be added by amendment if their exhaustion did not precede the original claims.
78	Weaver v. California Correctional Instituti	E.D. Cal.	2007 WL 2298074	8/8/2007	Dismissed for non-exhaustion; claim could not have been exhausted in the week between event and filing in federal court.

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

79	Ward v. Crawford	D. Nev.	2007 WL 2300562	8/7/2007	Plaintiff did not appeal greivance so claim was dismissed for non-exhaustion.
80	King v. CDC	E.D. Cal.	2007 WL 2265106	8/6/2007	Routine dismissal for failure to exhaust.
81	Tafoya v. Campbell	E.D. Cal.	2007 WL 2265591	8/6/2007	Dismissed for non-exhaustion; grievance was untimely.
82	Geray v. Andrews	E.D. Cal.	2007 WL 2237949	8/2/2007	Routine dismissal for non-exhaustion.
83	Miller v. High Desert State Prison	E.D. Cal.	2007 WL 2221059	8/2/2007	Court did not accept Plaintiffs argument that he could not exhaust because he was moved and he received threats and harrassment.
84	Morales v. Horel	N.D. Cal.	2007 WL 2212892	7/31/2007	Dismissed for non-exhaustion for not specifying in an individual grievance that the individual plaintiff was affected by the problem he described.
85	Mitchell v. Perez	E.D. Cal.	2007 WL 2225795	7/31/2007	Routine dismissal for failure to exhaust.
86	Bautista v. Babcock	N.D. Cal.	2007 WL 2221027	7/30/2007	Routine dismissal for non-exhaustion.
87	Rollings-Pleasant v. Deuel Vocational Ins	E.D. Cal.	2007 WL 2177832	7/27/2007	Dismissed for non-exhaustion

Cases In the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

88	Welch v. California Dept. of Corrections	E.D. Cal.	2007 WL 2156243	7/25/2007	Plaintiff filed suit in 2003 challenging grooming regulations on religious grounds. In 2006, new regs were promulgated. Plaintiff can't challenge the enforcement of the 2006 regs against him without exhausting first.
89	Olson v. Officials of IDOC	D. Idaho	2007 WL 2164530	7/25/2007	Dismissed for non-exhaustion
90	Smith v. Woodford	N.D. Cal.	2007 WL 2122648	7/23/2007	Dismissed for non-exhaustion
91	Merrida v. California Dept. of Corrections	E.D. Cal.	2007 WL 2120260	7/23/2007	A partial grant of relief in the administrative process does not excuse the plaintiff from completing the process. Filing a tort claim does not exhaust.
92	Johnson v. Hensel	N.D. Cal.	2007 WL 2123696	7/23/2007	Plaintiff did not exhuast; he filed before the process was complete
93	Jennings v. Hulzar	D. Ariz.	2007 WL 2081200	7/19/2007	Mostly routine dismisal for non-exhaustion.
94	Hart v. Farwell	D. Nev.	2007 WL 2049845	7/12/2007	Partly dismissed for non-exhaustion.
95	Jenkins v. Baumler	E.D. Cal.	2007 WL 2023538	7/11/2007	Routine dismissal for non-exhaustion
96	Chatman v. Johnson	E.D. Cal.	2007 WL 2023544	7/11/2007	Dismissal for non-exhaustion

Cases in the 9th Circuit Dismissed Due to PLRA's Exhaustion Requirement
(July 2007-February 2008)

97	Keal v. Washington	W.D. Wash.	2007 WL 1977155	7/3/2007	Plaintiff's use of force claim is dismissed for non-exhaustion.
96	Todd v. LaMarque	N.D. Cal.	2007 WL 1982789	7/2/2007	Plaintiffs claims were dismissed against officers that he did not specifically mention in his grievances.

APPENDIX VI

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
Ms Ashe	9-17-07
FROM: Yarik Vargas	REGISTER NO.: 14994-031
WORK ASSIGNMENT: 5-9 pm	UNIT: C-3 C 115

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

ahora en Septiembre ise un año En Esta intitusion y Sigo Esperando para pode ir a Clases de "Esl" Espero i no tenga q Esperar otro año mas

Atte. Vargas

(Do not write below this line)

DISPOSITION:

Write this to me in English and I will respond to you.

Signature Staff Member	Date
GMAshe	9.18.07

~~Routing Copy - File Copy - Inmate~~
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

FORM 2131E (5/99)

STATE OF NEW YORK - DEPARTMENT OF CORRECTIONAL SERVICES

INMATE GRIEVANCE COMPLAINT

Grievance No. ONI-9442-06

(24)

ONEida CORRECTIONAL FACILITY

Date 2-13-06

Name [redacted] Dept.No [redacted] Housing Unit W/18 - SHU

Program _____ AM _____ PM

(Please Print or Type - This form must be filed within 14 days of Grievance Incident)

Description of Problem: (Please make as brief as possible) ON or about 1-29-06. I submitted a ADA request for a Handicap sink to be put in my cell, because Im unable to use the sink normally. have polio in my right arm & Hand and Im unable to use it at all. my request has been submitted well over the required time in which the D.S.P., has to respond. have not heard one word from the superintendent or staff, [redacted] Atleet ms. I also feel that this facility is discrimanating against me because of my right arm & hand.

Grievant Signature [redacted]

Grievance Clerk _____ Date: _____

Advisor Requested ☒ YES ☐ NO Who: I , Nurse Administrator

Action requested by inmate: That I be granted Handicap sink, so that I may use them for my personal daily cleaning of my person. the same as everybody else.

This Grievance has been informally resolved as follows:

RECEIVED FEB 21 2006 INMATE GRIEVANCE

This Informal Resolution is accepted:
(To be completed only if resolved prior to hearing)

Grievant Signature _____ Date: _____

If unresolved, you are entitled to a hearing by the Inmate Grievance Resolution Committee (IGRC).

FORM 2131E (5/86)

Response of IGRC: Grievance is denied. Current sink is Sufficient to attend to personal hygiene.

Date Returned to Inmate _____ IGRC Members _____

Chairperson 2/23/06

Return within 4 days and check appropriate boxes.

- ☐ I disagree with IGRC response.
- ☐ I agree with the IGRC response.
- ☐ I have reviewed deadlocked response. Pass-Thru to Superintendent
- ☐ I wish to appeal to the Superintendent.

Signed _____ Date _____
Grievant

Grievance Clerk's Receipt

RECEIVED FEB 23 2006 INMATE GRIEVANCE

RECEIVED FEB 21 2006 INMATE GRIEVANCE

RECEIVED FEB 21 2006 INMATE GRIEVANCE

To be completed by Grievance Clerk.

Grievance Appealed to the Superintendent _____
Date

Grievance forwarded to the Superintendent for action _____
Date

Form DC-135A

INMATE REQUEST TO STAFF MEMBER

PERIOD NOT A COMMA

Commonwealth of Pennsylvania
Department of Corrections

INSTRUCTIONS
Complete items number 1 thru 8. If you follow instructions in preparing your request, it can be responded to more promptly and intelligently.

1. To: (Name and Title of Officer) LT TODIAN - RHU LT.	2. Date: 08-24-07
3. By: (Print Inmate Name and Number) ROBERT D. VINCENT CX4335 (Print Name / DOC Number)	4. Counselor's Name: SKUTACK
Robert D. Vincent (Inmate's Signature)	5. Unit Manager's Name: Ellett
6. Work Assignment: N/A	7. Housing Assignment: R.H.U 2001

LT,

ONCE AGAIN I COME TO YOU DUE TO HARASSMENT by THE 1ST SHIFT. OCCURING ONCE AGAIN WAS THEM dumping my (WASTE BAG) (OR TRASH) IN AND AROUND THE CELL TOILET for KNOW JUSTIFIABLE REASON. WHICH I Told You About before THIS WHEN THE SAME INDIVIDUALS did it BACK ON 8-17-07.

"I ASK THAT IT BE STOPPED"

CC: files

PLEASE RESUBMIT WHEN SPELLED & PUNCTUATED PROPERLY.

To DC-14 CAR only ☐ To DC-14 CAR and DC-15 IRS ☐

Staff Member Name _____ / _____ Date _____
(Print) (Sign)

Revised July 2000 SCI Waymart Printing School

C-2

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: McCoy, Steven J. 15511-040 Unit: J Lewisburg
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A- INMATE REQUEST Although I have been released from the "Special Housing" Unit, I am still requesting that all the third banks in the Units be removed because,(1) They do not comply with safety requirements in that no safe and approved means of access is provided to the upper banks. There are no ladders and the "stool" provided for the desk is clearly marked "no step" and will easily topple with an off-center step. (2) There is not enough safe headroom supplied between the lower and upper banks to avoid potentially serious head or neck injuries. The primary reason the the banks should be removed, however, and the reason that impacts me directly, is that installing the third banks has overcrowded the Units 50% over capacity, creating intolerably stressful living conditions for inmates... There is not room in the three-man cubes for two people to change clothes simultaneously without getting in each other's way, much less three. 30 people have been packed into a Unit designed for 200 to compete for the use of the same number of microwaves & washers & dryers that were safe available to half that number of inmates at the medium-security facility I came from in McKean. This has led to conflict and resulted in groups of inmates maintaining control over the microwaves and laundry and controlling who can cook and do their laundry. In the TV room on 5/29/07, after I had been sitting in an unoccupied seat for two hours, I was approached by another inmate and told I was sitting in "his chair". When I refused to move, a fight almost occurred, which ended with the other inmate repeatedly referring to me as a "white piece of shit"... The overcrowding impacts my ability to work or my legal (See Cont. pa

5/31/07
DATE

SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

SECOND COPY: RETURN TO INMATE

CASE NUMBER: 455151-R1

CASE NUMBER:

Part C- RECEIPT

Return to:
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

BP-S0148
APRIL 1982

USP LAM

Continuation Page to BP-9 Administrative Remedy

claims because there are not enough typewriters for the demand of over 1200 inmates. Oftentimes when I go to the law library, there is no typewriter available. Most of the time, the only way to get a typewriter is to crowd and elbow your way through the door when the library opens. There is no place to escape from the constant overcrowding to maintain the concentration required to draft complex legal documents except the so-called"quiet room", which is often overcrowded and unavailable itself.

The overcrowding at LSCI Allenwood is dangerous and unsafe; has been scientifically proven to negatively affect psychological stability, and is unhealthy, leading to the rapid spread of communicable diseases, which at other BOP facilities has resulted in vastly increased incidences of tuberculosis and antibiotic-resistant staph infections. It would be considered inhumane to crowd animals together in the way inmates have been packed into 3-man cubes at LSCI Allenwood and, in fact, I believe that under Department of Agriculture regulations, hogs being raised for slaughter in commercial hogbarns are legally required to be given more living space than is being provided to the human inmates at LSCI Allenwood.

Steven A. McGee

Steven A McGee

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JULY 28, 2007

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : STEVEN ALLEN MCGEE, 10811-040
ALLENWOOD LOW FCI UNT: BRADY QTR: B04-501L
P.O. BOX 1500
WHITE DEER, PA 17887

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL
IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY
OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 455181-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : JULY 26, 2007
SUBJECT 1 : SAFETY, SANITATION, ENVIRONMENTAL CONDITIONS
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR REQUEST IS UNTIMELY. INSTITUTION AND CCC REQUESTS (BP-09) MUST BE RECEIVED W/20 DAYS OF THE EVENT COMPLAINED ABOUT.

REMARKS : WE CONCUR WITH THE INSTITUTION'S DECISION.

Testimony of Public Justice
Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security
Concerning the Prison Litigation Reform Act
April 22, 2008

Prepared by Adele P. Kimmel, Managing Attorney, Public Justice[1]

Introduction

Public Justice welcomes this opportunity to present testimony to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security regarding our concerns about the administrative exhaustion requirement of the Prison Litigation Reform Act of 1996 (PLRA). The PLRA's exhaustion requirement imposes severe limitations on the ability of prisoners to challenge and obtain relief, through civil litigation, for abusive prison conditions. It prevents countless meritorious claims—including claims of serious physical abuse—from being fully adjudicated by federal courts. This is in part due to overly stringent internal grievance procedures that require prisoners to meet tight deadlines for filing initial grievances and making administrative appeals, as well as interference with prisoners' efforts to avail themselves of the internal grievance process.

Public Justice does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, respond to information requests from legislators and persons interested in legislation, and have occasionally been invited to testify before legislative and administrative bodies on issues within our expertise. In keeping with this practice, we are grateful for the opportunity to share our experience with respect to the important issues the Subcommittee is considering today.

In particular, we would like to inform the Subcommittee about a lawsuit pending in Louisiana that illustrates one of the ways in which the PLRA's exhaustion requirement prevents prisoners with meritorious claims of serious abuse from getting their day in court and obtaining relief for the abuse they have suffered.

Background on Public Justice

Public Justice (formerly Trial Lawyers for Public Justice), founded in 1982, is a national public interest law firm specializing in precedent-setting and socially significant individual and class action litigation. We handle a broader range of high-impact, cutting-edge litigation than any other public interest firm in the nation. Our litigation fights for consumer and victims' rights, the environment, civil rights and civil liberties, public health and safety, workers' rights, government and corporate accountability, and the protection of the poor and powerless. Through

[1] Adele P. Kimmel is the Managing Attorney at Public Justice, where she handles precedent-setting civil litigation designed to further civil rights and civil liberties. Among other things, she specializes in representing prisoners and immigration detainees who have suffered egregious abuse and/or medical neglect.

our Access to Justice Campaign, we strive to keep the courthouse doors open to all—by battling federal preemption, unnecessary court secrecy, class action bans and abuses, the misuse of mandatory arbitration, and other efforts to deprive people of their day in court.

Public Justice is the principal project of the Public Justice Foundation, a non-profit membership organization. We are supported by a nationwide network of over 3,000 attorneys and others, including trial lawyers, appellate lawyers, consumer advocates, constitutional litigators, employment lawyers, environmental lawyers, civil rights lawyers, class action specialists, law professors, and law students. Public Justice and the Public Justice Foundation are headquartered in Washington, D.C., and have a West Coast Office in Oakland, California. More information about Public Justice and our work is available on our web site at www.publicjustice.net.

Public Justice's broad-ranging docket includes litigation on behalf of prisoners and immigration detainees who have suffered egregious abuse and/or medical neglect. Based on our experience, we believe that the PLRA's exhaustion requirement deprives countless prisoners with meritorious claims of abuse from getting their day in court. Public Justice is currently litigating a prisoner abuse case in the United States District Court for the Western District of Louisiana (Alexandria Division)—*Dillon v. Rogers, et al.*, Civil Action No. 06-1258 that illustrates this problem.

Problems with the PLRA's Exhaustion Requirement

On March 20, 2008, the United States District Court for the Western District of Louisiana dismissed an abused prisoner's case for failure to exhaust administrative remedies, even though no grievance procedures were available to him and he had tried to submit a grievance. Although the case is now on appeal, and the decision could ultimately be reversed, the district court's interpretation of the PLRA's exhaustion requirement illustrates one of the ways in which the overly restrictive requirement deprives prisoners with meritorious abuse claims from obtaining relief through our civil justice system.

A. The Beatings Suffered by Keith Dillon

Dillon v. Rogers is one in a series of civil rights actions arising out of a pattern of unconstitutional beatings that occurred at Jena Correctional Center (Jena) after Hurricane Katrina hit the Gulf Coast Region in August 2005. It is related to at least five other cases pending in the same court: *Smith v. Stalder*, No. 06-1561; *Cummings v. Stalder*, No. 06-1511; *Gilmore v. Stalder*, No. 06-1509; *Hall v. Stalder*, No. 06-1510; and *Vassar v. Stalder*, No. 06-1512.

Jena had been closed for five years before the hurricane, after a federal judge had concluded that it was the site of numerous constitutional violations. After Katrina, the Louisiana Department of Safety and Corrections (DPSC) hastily reopened the facility to house prisoners from several facilities, including the Jefferson Parish Correction Center (JPCC), where Keith

Dillon had been detained. Jena then stayed open for just over a month. The Jena prisoners, including Dillon, were then sent to other facilities in Louisiana.

Attorneys who interviewed prisoners during their incarceration at Jena reported that prisoners repeatedly expressed that they were "terrified" and "scared for their lives" inside Jena. The Jena prisoners were reportedly slapped, punched, beaten, stripped naked, hit with belts, and kicked by correctional officers. It was reported that, when prisoners broke prison rules, such as moving when told to be still, or not moving quickly enough, officers often responded by hitting and kicking the men and threatening to whip them.

Dillon's experience at Jena was no exception to the lawlessness that pervaded the atmosphere there. On September 27, 2005, Dillon and other prisoners were made to stand in line for an excessive period of time in order to be fed. Dillon ended up having a minor scuffle with a fellow prisoner, Jesse Gilmore, which ended as soon as Defendant Walker, a prison guard, yelled for them to stop. Both men complied immediately.

Dillon was grabbed by Walker and punched in the side of his head by two other guards, Defendants Edwards and Casper. Both Dillon and Gilmore were then dragged along the floor, and each was taken into the back of separate hallways. The guards then slammed Dillon down to the floor and handcuffed him behind his back. At this point, Defendant Pietsch, another guard, approached and kicked Dillon several times in the back.

Defendant Walker commented that the rest of the room could see what was happening. The guards then picked Dillon up, moved him further back in the hall, and slammed him to the floor again. Defendant Pietsch continued to kick Dillon repeatedly in the back, each time causing Dillon's face to hit the wall. Dillon could hear the guards beating Gilmore as well.

Dillon was next picked up by Defendants Edwards and Walker and was forced to face them. Edwards then punched Dillon in his right shoulder. He then repeated this action, punching Dillon hard in the same spot. Dillon continues to experience, among other serious injuries, searing pain in his right shoulder and bicep as a result Edwards's punches.

Up to this point in the beating incident, Dillon estimates that he was hit in the shoulder twice and on the sides of his head six to eight times by Defendant Edwards, kicked in the back several times and hit in the head three times by Defendant Pietsch, hit in the head twice and slammed to the ground twice by Defendant Walker, and hit in the head at least once by two other guards, Defendants Caspers and Hartzoglou.

Dillon was then dragged into the lock-down area, where he observed Gilmore being beaten. Defendant Hollifield pushed Dillon onto his knees, forcing Dillon's his head to hit a wall. Hollifield then proceeded to hit Dillon in the head.

Defendant Rogers, who supervised the guards at Jena, then came into the lock-down area. Rogers began to verbally harass Dillon and then hit him repeatedly in the head, alternating sides. At this point, Dillon was in serious pain and feared for his life. Dillon believes Rogers hit him approximately 12 to 15 times in the head. On approximately the fifth blow to the left side of his head, Dillon heard a "pop" and lost the hearing in his left ear.

After Rogers beat Dillon, Defendant Hollifield commented that "you should have given him more," and proceeded to hit Dillon approximately three more times in the head. Dillon was then stripped naked and put in a cell next to another inmate who also appeared to have been badly beaten.

During the entire beating, Defendants used the hard "ball" of their palms, as opposed to their closed fists, to strike Dillon in the head. This decreased the chances of visible scarring and other damage to their hands, thereby decreasing evidence of the beating they inflicted on Dillon.

Despite making Jena medical and other personnel aware of the injuries he suffered, Dillon received nothing more than inadequate pain medication for the serious injuries he sustained. While at Jena, and while subsequently detained at other facilities, Dillon received no diagnosis of, nor treatment for, the multiple injuries he sustained, including the hearing loss in his left ear.

As a result of the beatings he received at Jena, Dillon has pain and hearing loss in his left ear and continues to suffer from pain in his back and knees, severe shooting pain in his right shoulder and down his bicep, as well as frequent headaches, pain in his eye-sockets, blurred vision, and broken teeth. Moreover, as a result of the abuse he endured, Dillon has been suffering from emotional distress and bouts of depression.

B. Dillon's Efforts to File an Administrative Grievance

On or about September 28, 2005, the day after Dillon's beating, Dillon attempted to file an administrative grievance, or Administrative Remedy Procedure (ARP), but Jena, having been closed down for several years, had no grievance procedure in place. This absence of any internal grievance procedure was reported by other inmates and attorneys who surveyed the conditions at Jena at the time of Dillon's detention there. When Dillon asked Defendant Rogers about the abuse that was going on at Jena and whether he could file a complaint, Rogers ordered Dillon to kneel in his office for approximately an hour, stating "stay here a while until you forget about that ARP."

Moreover, the continuing explicit threats by guards, the concerted efforts to mask the abuse that was occurring, the widespread complicity of Jena officials—including Warden Thompson himself—and the intimidation witnessed by the nurse who saw Dillon after the beating, all left Dillon in fear for his life had he further attempted to report the abuse while detained at Jena.

On October 5, 2005, Rachel Jones, a Louisiana attorney, visited Jena and interviewed numerous prisoners, including Dillon. Jones has sworn under oath that Jena had no grievance procedure. She has also sworn under oath that Dillon told her about his beatings and that she saw bruises on his head and ears. Dillon was able to smuggle a handwritten grievance to Jones, in an envelope addressed to the DPSC, in the hope that she would pass it on to the DPSC and the FBI.

Within days after speaking with Jones, Dillon was transferred out of Jena. Soon after Dillon's transfer, Jena was shut down by Richard Stalder, Secretary of the DPSC, amid allegations of egregious abuse and inquiries from Human Rights Watch and Louisiana state legislators.

From Jena, Dillon was transferred to and remained at Allen Correctional Facility ("Allen") from in or about October 2005 until on or about March 21, 2006. Allen is privately operated by Geo Group, Inc. (formerly Wackenhut Corrections Corporation). Dillon was subsequently transferred from Allen back to the JPCC.

Upon his arrival at Allen, Dillon inquired about filing a grievance for the abuse he endured at Jena. He was told by Allen officials, including a Captain Wheaton, that he could not file a grievance about that from Allen, stating, in essence, "you are here now . . . and we are Wackenhut and they are the DOC and we have nothing to do with them . . . there is no point in filing your grievance . . . you are here now."

Despite Dillon's requests, officials at Allen provided Dillon with no means of filing a grievance concerning the events at Jena. Though Dillon did file grievances at Allen regarding his medical care there, he did not file a grievance about the events at Jena because he was told not to do so by Allen officials, was provided no means of doing so, and he had learned that Jena had been closed down.

Dillon did, however, file a grievance at Allen requesting that the authorities at Allen confirm whether he could file a grievance there concerning the abuse he suffered at Jena, and complaining about the fact that Allen officials had told him he could not file a grievance about his beatings at Jena. That grievance went unanswered.

C. The Court's Dismissal of Dillon's Case

On March 20, 2008, the district court granted Defendants' Motion for Summary Judgment and dismissed Dillon's case for failure to exhaust administrative remedies. This was done notwithstanding that: (1) there was no available administrative grievance procedure at Jena while Dillon was there; (2) even without an available administrative grievance procedure, Dillon managed to smuggle a grievance to an attorney who visited Jena after his beating, in an envelope addressed to the DPSC; (3) Dillon was told there was no available administrative grievance procedure at Allen for complaints involving misconduct at Jena; and (4) Dillon submitted a

grievance at Allen complaining about being told that he could not file a grievance there for the beatings he suffered at Jena, but never received a response.

Perhaps even more important, the district court dismissed Dillon's case, even though, as a matter of law, there was no grievance procedure available at Allen for complaints concerning events at Jena. This is because Jena was closed down shortly after Dillon was transferred to Allen, and Louisiana regulations require the sending institution—i.e., Jena—to complete the processing of the grievance through the first step.[2] Based on Louisiana regulations, even if Dillon had filed a grievance at Allen about the abuse he suffered at Jena, Allen's only role would have been to facilitate communication between Dillon and Jena. Since Jena ceased to exist -notably, because of overwhelming allegations of abuse - there truly were no procedures available to Dillon and no one with authority to provide any redress.

In short, Dillon has been denied his right to seek redress through our civil justice system for failing to exhaust his administrative remedies under the PLRA, even though no administrative grievance procedures were actually available to him and even though he made efforts to file a grievance. Dillon was physically abused while in prison and is now suffering an abuse of his right to be heard in court. This kind of injustice should not be permitted.

Conclusion

The PLRA's exhaustion requirement prevents countless prisoners with meritorious abuse claims from obtaining redress. Not only does it unjustifiably deny prisoners access to the federal courts, but it permits unconstitutional prison conditions to fester because it prevents courts from holding corrections officials accountable for their wrongdoing.

Public Justice is grateful to the Subcommittee for examining reforms to the PLRA's exhaustion requirement and we appreciate the opportunity to present this testimony.

[2] The Louisiana Administrative Review Procedure states:

> Transferred Inmates: When an inmate has filed a request at one institution and is transferred prior to the review, or if he files a request after transfer on an action taken be the sending institution, *the sending institution will complete the process through the first step*. The Warden of the receiving institution will assist in communication with the inmate.

Title 22. Corrections, Criminal Justice and Law Enforcement. Chapter 3 § 325(G)(8) ("Adult Administrative Review Procedures") (emphasis added).



PHILADELPHIA
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April 17, 2008

House Judiciary Subcommittee on
Crime, Terrorism, and Homeland Security
c/o Ms. Rachel King
2138 Rayburn House Office Building
Washington, DC 20515

Dear Representative:

I am writing on behalf of the 13,000 members of the Philadelphia Bar Association to request that you support the Prison Abuse Remedies Act of 2007, HR 4109. Enclosed please find the resolution adopted by the Philadelphia Bar Association Board of Governors supporting HR 4109.

The aim of the Prison Abuse Remedies Act is to reform the Prison Litigation Reform Act of 1996, which was passed to reduce frivolous prisoner lawsuits, but in reality has made it nearly impossible for prisoners to report abuse and unconstitutional conditions of confinement in federal court.

I urge you to vote in favor of HR 4109 which would ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights and that prisoners are subject to procedures applicable to the general public when bringing lawsuits.

Sincerely,

A. Michael Pratt, Esq.
Chancellor

Enclosure



Policy and Leadership

Board of Governors

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Resolution Endorsing the Prison Abuse Remedies Act of 2007, HR 4109

WHEREAS, Congress passed the Prisoner Litigation Reform Act ("PLRA") in 1996 with a stated purpose of curtailing frivolous litigation by prisoners by various means including but not limited to, requiring exhaustion of available administrative remedies, reducing attorney fee hourly rates and allowing for early dismissal of "frivolous" cases;

WHEREAS, the PLRA was not closely examined by the appropriate congressional committees and was passed as a rider to an appropriations bill;

WHEREAS, the PLRA places formidable and often insurmountable obstacles in the paths of incarcerated individuals seeking redress from the courts for violations of federally secured rights;

WHEREAS, the PLRA singles out for differential treatment individuals who are particularly vulnerable to violations to their constitutional and other legal rights due to high levels of illiteracy and mental illness;

WHEREAS, the Prison Abuse Remedies Act of 2007, HR 4109, addresses the above-recited concerns regarding the deficiencies of the PLRA;

WHEREAS, the Prison Abuse Remedies Act of 2007 would effect the following changes in the PLRA:

1. Repeal the requirement that prisoners (including committed and detained juveniles and pretrial detainees, as well as sentenced prisoners) suffer a physical injury in order to recover for mental or emotional injuries caused by their subjection to cruel and unusual punishment or other illegal conduct;
2. Amend the requirement for exhaustion of administrative remedies to require that a prisoner who has not exhausted administrative remedies at the time a lawsuit is filed be permitted to pursue the claim through an administrative- remedy process, with the lawsuit stayed for up to 90 days pending the administrative processing of the claim;
3. Repeal the restrictions on the equitable authority of federal courts in conditions-of-confinement cases;
4. Amend the PLRA to allow prisoners who prevail on civil rights claims to recover attorney's fees on the same basis as the general public in civil rights cases;
5. Repeal the provisions extending the PLRA to juveniles confined in juvenile detention and correctional facilities; and
6. Repeal the filing fee provisions that apply only to prisoners.

NOW, THEREFORE, BE IT RESOLVED that the Philadelphia Bar Association supports the amendments to the PLRA encompassed by the Prison Abuse Remedies Act of 2007, or similar legislation, which would ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights and that prisoners are subject to procedures applicable to the general public when bringing lawsuits.

AND BE IT FURTHER RESOLVED that the Chancellor or his designee communicate the Philadelphia Bar Association's position to the Pennsylvania Congressional Delegation and urge our Members of Congress and Senators to vote in favor of the Prison Abuse Remedies Act of 2007, HR 4109.

PHILADELPHIA BAR ASSOCIATION
BOARD OF GOVERNORS
ADOPTED: FEBRUARY 28, 2008

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National Center for Youth Law

MAR 0 3 2008

February 20, 2008

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The Honorable Bobby Scott, VA – Chair
House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Representative Scott,

The National Center for Youth Law (NCYL) is writing to ask for your support for legislation that would amend the Prison Reform Litigation Act to exclude prisoners under the age of 18 and to enact other reforms. The Prison Reform Litigation Act (PRLA) was signed into law in 1996. The original intent of the PRLA was to reduce frivolous litigation by prisoners. After twelve years, however, it is evident that unintended consequences of the law have left incarcerated children with little judicial protection against incidents of physical and sexual abuse and other violations of their rights. NCYL urges you to support H.R. 4109, the "Prison Abuse Remedies Act of 2007," introduced by Representative Bobby Scott and co-sponsored by Representative John Conyers. This legislation is necessary to safeguard our youth and is adamantly supported by the National Center for Youth Law.

For over thirty years, NCYL has worked to ensure that youth in trouble with the law are treated fairly and appropriately for their age and capacity to change. NCYL promotes reforms that keep youth from entering the juvenile justice system, and also strives to protect the safety and welfare of youth in custody. Prior to the passage of the PRLA, NCYL set the standard for safe and human treatment of youth in *Morales v. Turman*, litigation that challenged juvenile justice practices in Texas. The case established benchmark standards for the treatment of confined juveniles, including access to medical and psychiatric care, meaningful education, and appropriate disciplinary procedures. Following *Morales*, NCYL brought other cases ensuring the safety of youth in custody, including:

- *Flores v. Reno*, challenged the detention of children in INS custody and the conditions under which they were detained. This lawsuit resulted in a national INS policy in favor of the release of children. It also established minimum standards for the care of necessarily detained children.

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- *Terry D. V. Rader*, NCYL stopped the practice of hog-tying disruptive youth in Oklahoma. This case also resulted in the closure of five large juvenile prisons in that state.
- *L.O. v. McKenzie*, NCYL successfully challenged the practice of strapping youth at a Missouri detention facility to a board and hanging them upside down.
- *Danny O. v. Bowman*, successfully challenged the use of "standing walls" and "sitting chairs" to punish youth for minor infractions at a training school in Idaho.
- *Johnson v. Upchurch*, NCYL stopped the practice of placing youth in solitary confinement for months at a time in Arizona state juvenile facilities, as well as the excessive reliance on four-point restraints to control youth.
- *Horton v. Williams*, challenged the use of pepper spray to punish youth at a large training school in Washington State. The lawsuit resulted in an injunction ending the use of pepper spray except in narrowly defined emergency circumstances. The facility then stopped using it altogether.

Tragically, NCYL's important work to ensure the safety of confined juveniles came to an end in 1998, not because youth were no longer enduring unsafe and inhumane treatment in juvenile facilities, but because the passage of the PRLA so restricted juveniles' access to the courts that such cases were no longer viable avenues for reform.

Meanwhile, the mistreatment and abuse of youth in juvenile facilities continues to occur. In recent years there has been an appalling number of reports of physical and sexual assaults on children in juvenile facilities, regular use of "pepper spray" (tear gas with red pepper extract), deaths from wrongly applied restraints and suicides, and other physical and emotional dangers for young people. In Texas, more than 2,000 complaints of abuse were reported in some 50 facilities operated or contracted by the Texas Youth Commission (TYC). There have been continuing reports of repeated use of "pepper spray" in TYC facilities. In Indiana and Ohio, staff in juvenile facilities sexually abused children in their care. In Maryland, Tennessee, and Florida, children died as a result of staff mistreatment or incompetence. In California, young inmates have often been locked in cages as punishment, and those with mental health problems have been improperly cared for and drugged. In Mississippi, children were hog-tied, shackled to poles, and kept naked in dark windowless cells for days at a time with only a drain in the floor to serve as a toilet.

The Prison Litigation Reform Act has prevented many children in similar circumstances from obtaining protection in the courts from such abuse. Moreover, the core goal of the PLRA has little application to children: juveniles do not file frivolous lawsuits. Indeed, at the time the PRLA was passed, there was no legislative history to suggest that children file frivolous lawsuits and, in fact, juveniles engage in very little inmate litigation. Unlike adult prisoners, children lack exposure to the legal system, access to law libraries, legal materials, or jailhouse lawyers, and the inclination to confront abusive caretakers through the legal system. All of these factors make juveniles much less likely to bring any challenge to the conditions of their confinement. Finally, federal courts are already protected from a flood of frivolous litigation by incarcerated youth: persons under the age of 18 cannot file civil lawsuits on their own. Federal Rule of Civil Procedure 17(c) requires that a guardian, "next friend," or guardian ad litem represent a minor in any civil lawsuit. This rule is constructed to ensure that an adult with the minor's best interest in mind participate in any legal action on the child's behalf. Such an adult would not proceed with a frivolous lawsuit—the Federal Rules provide for sanctions against lawyers who file frivolous suits, and our experience is clear that parents rarely, if ever, file lawsuits without the benefit of legal counsel.

The Prison Reform Litigation Act was not designed to address the particular characteristics of incarcerated youth. Applying the PRLA to children does not protect the courts from a flood of frivolous lawsuits, because no such flood exists. Rather the PRLA is a nearly insurmountable barrier that denies youth access to the courts and the protections that only the judicial system can provide.

We urge you to support H.R. 4109 and exempt children from the Prison Reform Litigation Act. Thank you for your attention to this important matter.

Sincerely,

Frankie Guzman
Assistant to the Director
National Center for Youth Law

Molly L. Dunn
Staff Attorney
National Center for Youth Law

Simplification Draft Paper

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

The Sentencing Reform Act of 1984: Principal Features
Affecting Guideline Construction
Overview

The 1984 Sentencing Reform Act (SRA) and the sentencing guidelines it spawned represent perhaps the most dramatic change in sentencing law and practice in our Nation's history. This paper examines that legislation in terms of the general and specific constraints imposed on the Sentencing Commission's construction of sentencing guidelines. Subsequently enacted legislation that has impacted Commission decisions in shaping the guidelines also will be discussed briefly. The purpose of this analysis is to give commissioners, as they contemplate revisiting some of the policy and drafting decisions underpinning the initial guidelines, a greater understanding of the extent to which those decisions were mandated or influenced by Congress's vision and policy choices. Working with this statutory framework, the initial Commission itself subsequently made additional policy decisions, some of major significance (*e.g.*, the decisions regarding the balance between an offense of conviction and real offense sentencing system, discussed in the Relevant Conduct paper).

Background and Purposes of the SRA

At the outset, at least three observations about the SRA appear pertinent. First, the Act was well considered over a period of years, with its final passage in 1984 culminating a decade of hearings, committee mark-ups, and floor consideration. Second, it enjoyed strong bipartisan support, especially in the Senate where its final passage was endorsed by all but Senator Mathias. Third--and cutting somewhat in the other direction--the enacted version represents a unicameral blueprint shaped almost entirely by the Senate. The Senate-passed bill subsequently was passed by the House without amendment, and over the opposition of the House Judiciary Committee leadership, as a rider on a continuing appropriations bill. 1*See generally,* U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 1-8 (1987); William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem, 2 Crim. L. Forum 355 (1991).

Among the principal purposes of the SRA were: (1) to establish comprehensive and coordinated statutory authority for sentencing (through the sentencing provisions currently found in chapters 227-235 of title 18, United States Code), (2) to address the seemingly intractable problem of unwarranted sentencing disparity and enhance crime control by creating an independent, expert sentencing commission to devise and update periodically a system of mandatory sentencing guidelines, and (3) principally through the sentencing commission, to create a means of assembling and distributing sentencing data, coordinating sentencing research and education, and generally advancing the state of knowledge about criminal behavior. 2*See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-39, 65, 161-62 (1983).

The road to enactment of the SRA in the Fall of 1984 as title II of the omnibus Comprehensive Crime Control Act--itself being a substantive provision in a continuing appropriations resolution--was a relatively lengthy one. It began in 1975, with the introduction of a bill by Senator Edward M. Kennedy authorizing Judicial Conference appointment of a commission for the purpose of promulgating sentencing guidelines for court consideration. Senator Kennedy saw this as "the beginning of a concerted legislative effort to deal with sentencing disparity." Thereafter, in the next three Congresses, the guideline concept was refined as an integral part of an effort to comprehensively reform the federal criminal laws. Along the way, the sentencing reform legislation gained broad bipartisan support in the Senate. The House Judiciary Committee leadership remained less than enthusiastic about the worth of the legislation, however, particularly as the Senate bill was recast through successive iterations that progressively tightened intended guideline constraints on judicial discretion and decreased the relative influence of the Judiciary over the construction of the guidelines (while increasing the role of the Executive Branch).

- Eventually in 1983, the Senate gave up on the stymied criminal code revision effort and, under Republican

leadership, concentrated on a series of "crime control" initiatives (*e.g.*, bail reform, forfeiture, and various criminal penalty enhancements). Sentencing reform became a part of that agenda as well, because concerns about unwarranted disparity included concerns about undue leniency and the "revolving door" federal criminal justice system. Thus, in the 98th Congress, the Senate overwhelmingly passed the sentencing reform legislation as part of the Comprehensive Crime Control Act. In the Fall of 1984, the full House concurred in the legislation, and President Reagan signed it into law. 3U.S. Sentencing Comm'n, Supplementary Report, *supra* note 1. *See also* Kate Stith and Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223 (1993).

Principal SRA Features Affecting Guideline Drafting

An examination of the SRA in terms of its principal constraints pertinent to the construction of the sentencing guidelines shows that Congress employed a combination of general goals, overarching specific constraints, and more narrowly applicable specific instructions to inform the Commission's guideline development tasks. Additionally, the SRA described in some detail the process Congress expected the Commission to follow in formulating the guidelines.

Guideline goals

The enabling statute spells out three overall policy goals that the Commission's sentencing policies and practices are designed to achieve: (1) fulfilling the purposes of sentencing listed in the statute; *i.e.*, just punishment, deterrence, incapacitation, and rehabilitation; (2) providing certainty and fairness by avoiding unwarranted sentencing disparity among similar cases while ensuring individualized consideration of unique aggravating or mitigating factors, and (3) reflecting, insofar as practicable, "advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(A)-(C). Importantly, Congress did not elect, as some legislative bodies have, to give precedence to any single purpose of sentencing. 4Note, however, that in the case of a sentence to imprisonment, the court is precluded from using rehabilitation as the basis for that choice of sanction and the decision on sentence length. 18 U.S.C. 3582(a). *See also* 28 U.S.C. 994(k). Rather, it was believed that "each of the four purposes of sentencing should be considered" and individual case circumstances would dictate the paramount consideration. 5S. Rep. No. 225, *supra* note 2, at 68, 77. Similarly, the guidelines as a whole are not founded upon any single or predominantly considered sentencing purpose. Rather, the Commission elected to generally use an empirical measurement of past sentencing practice as the starting point for guideline development, adjusting as appropriate to better achieve congressional goals expressed in the SRA or subsequent legislation (such as the 1986 Anti-Drug Abuse Act). 6*See* USSG Ch. 1, Pt. A, at 3-4 (1994).

Mandatory versus discretionary guidelines

The legislative history indicates that Congress carefully considered the matter of whether the guidelines should be advisory guideposts or binding rules. The decision clearly came down on the "mandatory" side, notably excepting the provision allowing departure from the guideline range for exceptional aggravating or mitigating factors. *See* 18 U.S.C. 3553(b). In arriving at this decision, the Senate Judiciary Committee surveyed all state guideline systems in effect or under consideration at that time. Based on its review and a National Academy of Sciences study, the Committee concluded that a mandatory approach was necessary in order to effectively address disparity concerns. 7*Id.* at 61-62, 78-79. The Committee thus rejected efforts by Senator Mathias to make the guidelines more advisory. 8*Id.* at 79.

Subsequent to the 1984 SRA, Congress revisited the statutory departure standard as part of the Sentencing Act of 1987. The latter legislation amended 18 U.S.C. 3553(b) to permit expressly departures based on circumstances of an exceptional "kind" or "degree." The insertion of this new language was described by the manager of the House bill, Representative John Conyers, as "clarifying" in nature because it simply made explicit in the law that which was previously described in the Senate Committee Report as implicit and intended. 9133 Cong. Rec. H10017 (daily ed. Nov. 16, 1987) (statement of Mr. Conyers). On behalf of the House Judiciary Committee, Mr. Conyers also put forth an analysis containing a legal argument that, in addition to the departure authority for exceptional aggravating or mitigating factors under section 3553(b), section 3553 (a) also broadly authorized downward departures from the guidelines whenever a court concluded that the required minimum guideline sentence was greater than necessary to comply with the purposes of sentencing. This post-hoc interpretation of the 1984 Act's departure standard was vigorously disputed, however, by the principal Senate SRA sponsors, and has been rejected by appellate courts as an avenue of avoiding guideline requirements. 10133 Cong. Rec. S16646-48 (daily ed. Nov. 20, 1987) (statements of Senators Hatch, Biden, Thurmond, and Kennedy). The House Judiciary Committee view subsequently was considered and rejected by several appellate courts. *See, e.g.*, United States v. Davern, 970 F.2d 1490 (6th Cir. 1992), *cert. denied*, 113 S.

Ct. 1289 (1993); United States v. Johnston, 973 F.2d 611 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1019 (1993). *See also* United States v. Burns, 501 U.S. 129, 133 (1991) (only justification for departure is an aggravating or mitigating circumstance not adequately considered by the Commission).

Consequently, the currently operative statutory scheme can be fairly characterized as a system of mandatory guidelines. The principal statutory provisions that together achieve this result are the directive in 18 U.S.C. 3553(b) requiring a sentence within the guideline range absent basis for departure, the accompanying directive in subsection (c) requiring specific reasons for a departure sentence, and the appellate review scheme set forth in 18 U.S.C. 3742.

Overarching constraints

a. Statutory Penalties. Congress set forth two overarching constraints governing construction of the guidelines. First, the guidelines must be "consistent with all pertinent provisions of title 18, United States Code." 28 U.S.C. 994(b)(1). The legislative history does not elucidate exactly what was meant to be encompassed by this constraint. One possible explanation is that it was intended simply to underscore the guidelines' necessary subservience to statutory penalties and to emphasize that the guideline scheme should be carefully coordinated with the various court sentencing authorities and procedures in title 18. 11As indicated *supra*, for several successive Congresses, the SRA was considered as a component part of a comprehensive revision of federal criminal statutes. Under the proposed revision, each statutory offense was to have been assigned a letter grade based upon its relative seriousness, and a sentencing provision in title 18, now codified as section 3581(b), in turn would establish the maximum imprisonment penalty for each offense grade. This proposed penalty scheme may account in part for the directive to the Commission requiring consistency with all pertinent title 18 provisions.

b. 25 Percent Rule. The second overarching constraint, the so-called "25 percent rule" set forth in 28 U.S.C. 994(b), is described in the Senate Committee Report as "of major significance." 12S. Rep. No. 225, *supra* note 2, at 168. Because the manner in which the Commission heretofore has interpreted and applied this statutory constraint has been the source of recent debate, this issue warrants a somewhat expanded discussion.

Section 994(b), as amended by Public L. No. 99-646 (Nov. 10, 1986), provides as follows:

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

The Commission has read this subsection as controlling guideline construction in three ways. First, as paragraph (2) plainly says, the maximum permissible sentence in a guideline range of imprisonment may not exceed the minimum by more than 25 percent or six months, whichever is greater. Thus, the first limitation, derived entirely from the facial letter of the language in paragraph (2), bears directly on the maximum permissible width of an imprisonment range ultimately applicable under the guidelines. This straightforward application of the rule simply means that the guidelines may provide a range of, *e.g.*, 18-24 months (because the maximum exceeds the minimum by no more than six months), or 57-71 months (because the maximum exceeds the minimum by only 24.6%), but may not provide, *e.g.*, a range of 18-25 months (in which the maximum exceeds the minimum by seven months or 38.9%).

As enacted in 1984, section 994(b)(2) did not contain the alternative, "six months" maximum limit; *i.e.*, all ranges were constrained entirely by the 25 percent limit. Realizing that, at the low end of the imprisonment spectrum, this would entail unrealistically narrow ranges of, 30-37.5 days, *e.g.*, the Commission proposed in 1986 that Congress amend the statute to alternatively permit ranges as wide as one year (or 25 percent, whichever might be greater). The Department of Justice resisted this Commission initiative, and the House Criminal Justice Subcommittee concluded that the Commission's proposed one-year limitation was "inconsistent with the Sentencing Reform Act" goal of curbing unwarranted disparity. 13H.R. Rep. No. 614, 99th Cong., 2d Sess. 6-7 (1986). Hence, Congress settled on a compromise alternative upper limit of six months. 14Pub. L. No. 363, 99th Cong., 2d Sess. (Jul. 11, 1986). President Reagan signed the bill with "serious reservations," stating that "[t]he range of up to six months . . . is far in excess of what we visualized in 1983

and . . . would threaten the core purpose of the Sentencing Reform Act to establish fairness and certainty in sentencing by confining judicial discretion within a relatively narrow range." The President went on to say that his approval was based on "the understanding that the Sentencing Commission does not expect to utilize the full six-month range for offenses carrying a maximum penalty of two years imprisonment . . .". 15Statement of President Ronald Reagan accompanying signing of H.R. 4801, Pub. L. No. 363 (Jul. 11, 1986). Reflecting this "understanding," the Commission's initial guidelines provided a number of ranges at the low end of the sentencing table that were less than six months in width (*i.e.,* ranges of 0-1, 0-2, 0-3, 0-4, and 0-5 months were established). Effective November 1, 1989, however, the sentencing table was amended to substitute a range of 0-6 months for each of those ranges in which the maximum had been less than 6 months. See Appendix C, Amend. 270 (explaining that the amendment would eliminate certain anomalous results).

The second way in which the Commission heretofore has felt constrained by the 25 percent rule relates to the manner in which non-imprisonment sentences may substitute for required prison sentences within the same guideline range. For example, if the guidelines provide an imprisonment range of 18-24 months, the Commission has taken the view that it would be inconsistent with the 25 percent rule for the guidelines, absent departure, to also authorize a non-incarcerative sentence of straight probation (zero months' imprisonment). This perceived limitation derives from a logical linkage between the language of paragraphs (1) and (2) of subsection (b). Recall that paragraph (1) states that the guidelines shall establish a sentencing range "for each category of offense involving each category of defendant." Paragraph (2) then provides that "[i]f a sentence specified by the guidelines includes a term of imprisonment, the maximum of the *range* established for such a term shall not exceed the minimum of that *range* by more than the greater of 25 percent or six months . . ." Thus, under a strict reading of the combined statutory language, the Commission not only must establish a uniquely applicable guideline range for each cross-section of defendant and offense category, but if imprisonment is a sentencing option for defendants in that uniquely defined range, the 25 percent rule limits the extent to which a non-incarcerative sentence also can be an option for defendants in that same range. In other words, in the above example of a range of 18-24 months' imprisonment, an alternative guideline sentence of straight probation (0 months imprisonment) would not be permissible because the effective guideline range would then be 0-24 months--violating the 25 percent rule.

Nevertheless, in factoring non-imprisonment alternatives into the guidelines, the Commission has elected a less than completely literal interpretation of the statutory term "imprisonment" in section 994(b)(2). Commission implementation decisions in the Sentencing Table and related provisions of Chapter Five reflect a view that the 25 percent rule can be satisfied by "loss of liberty" equivalencies for imprisonment (*e.g.*, under 5C1.1(e)(3), one day of home confinement is punitively equivalent to one day of actual imprisonment). Using these equivalencies, the guidelines gradually blend in alternatives to imprisonment with straight imprisonment. As a result, if the applicable range is in Zone B of the Sentencing Table (*e.g.*, a range of 8-12 months), the court can substitute entirely intermittent, community or home confinement for the minimum prison sentence in the guideline range (*e.g.*, 6 months home confinement). And, if the applicable range is in Zone C of the Sentencing Table (*e.g.*, a range of 10-16 months), the guidelines permit substitution of community or home confinement as a condition of supervised release for up to one-half of the minimum prison sentence in the range (*e.g.*, a sentence of five months' imprisonment followed by a term of supervised release in which the defendant serves another five months in home confinement). This facet of the Commission's implementation of the 25 percent rule has been questioned by, for example, the Department of Justice (insofar as "equating" home detention with imprisonment), 16*See* statement of U.S. Attorney Robert H. Edmunds, Jr., on behalf of the Department of Justice, at 9-12. U.S. Sentencing Comm'n Hearing on Proposed Amendments to the Guidelines (Feb. 25, 1992). but apparently has not been tested in court.

The third manner in which the Commission has viewed the 25 percent rule as a constraint relates to the matter recently addressed by the Criminal Law Committee of the Judicial Conference. The Committee frames the issue as whether the 25 percent limitation applies only to the ultimately determined range on the Sentencing Table or whether it also applies to intermediate, offense level determinations leading up to the determination of the final guideline range. The Committee has in mind an approach embodied in its 1995 proposed revision of the role in the offense guidelines, under which it was suggested that the sentencing court be afforded discretion to select a role adjustment of from 1 to 4 levels, guided by a list of relevant considerations. The Committee concludes that the 25 percent rule permits such an approach and, furthermore, that such an approach is a preferable means of achieving SRA goals.

The Commission thoroughly aired and ultimately rejected this view in 1987 when it constructed the initial guidelines. The second draft of guidelines published for comment--the January 1987 Revised Draft--contained guidelines that, in a number of instances, proposed a choice among multiple base offense levels and also discretion to choose among multiple offense level adjustments for various aggravating and mitigating factors. 17*See* Exhibit 1, attached. After reviewing pro and con comments from a variety of sources, including legal and policy opposition expressed by Associate Attorney General Trott on behalf of the Department of Justice, 18*See*

Exhibit 2, attached. the Commission abandoned that approach in favor of uniquely determined offense levels.

At its core, the issue for Commission consideration is whether it is consistent with the SRA and congressional intent to permit a discretionary choice among multiple offense levels or criminal history categories for similarly situated defendants, given a sentencing table that also provides ranges of the maximum width. 19For purposes of analyzing this issue, it should be recognized that there is no essential difference in considering whether the statute permits discretionary choices among base offense levels, adjustments to base offense levels, final offense levels, or criminal history categories. However the issue is framed, it reduces to the same basic question of whether the 25 percent rules stands as a more comprehensive check on Commission and court discretion than simply a limit on the width of the ultimately applicable sentencing range. In the view of Counsel, that question generally must be answered in the negative so long as the current basic structure of the guidelines is maintained. Rather, section 994(b), as applied to the current guidelines structure, requires that a sentencing court's selection among multiple guideline choices be sufficiently channeled by Commission guidance so that a reviewing appellate court may determine, in accordance with 18 U.S.C. 3742, the "correctness" of the district court's decision in assigning the category of offense and offender, *i.e.*, the guideline range, to the defendant. 20This is not to suggest that it would be impossible to develop a guidelines structure that affords a greater measure of guided discretion. It is simply to state that any proposed modification should respect the 25 percent rule as more than a constraint on the width of the final guideline range.

While much could be said about this issue, 21Should the Commission deem it necessary, Counsel will be glad to prepare a more detailed legal analysis of the issue. two principal arguments persuade Counsel that the Commission's historical interpretation of this matter clearly is more faithful to statutory intent than the alternative view. The first derives from the statutory language itself. Because both paragraphs of section 994(b) relate to the same subject matter (*i.e.*, construction of guideline ranges) and were, save for the 1986 amendments to paragraph (2) discussed *supra*, enacted simultaneously as part of the same, overall statutory scheme (*i.e.*, the SRA), they clearly should be read, construed, and applied together. So construed, section 994(b) contemplates a uniquely applicable guideline range of sentences, that range varying by no more than the greater of 25 percent or six months, for each combination of offense and offender characteristics. In framing the rule, Congress could not know, and did not specify, how the Commission ultimately would construct its guidelines. Indeed, the legislative history indicates that "[t]he guidelines may be designed . . . in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices." 22S. Rep. No. 225, *supra* note 2, at 168. But, however the guidelines were designed, Congress contemplated that the guideline range(s) for a particular offense would be "each keyed to one or more variations in relevant factors, [with] no one particular guideline range [varying] by more than 25 percent." 23*Id.*

The Commission ultimately settled on a guideline scheme that, in its basic structure, uses (1) offense levels to describe the relative seriousness of an offense, (2) criminal history points and categories to describe the relative seriousness of the defendant's prior record, and (3) a sentencing table containing ranges that, in each instance, are of the maximum width allowed under section 994(b)(2). Section 994(b) speaks to the degree of unfettered sentencing variation permitted under that scheme taken as a whole, when applied to any given cross-section of offense and offender categories. Having already made the final ranges as wide as section 994 (b)(2) permits, it logically follows that if the guideline scheme were altered to additionally permit variation among multiple offense levels or criminal history categories for otherwise similar offenders, the range of guideline-permissible sentences for that offender category would effectively vary by more than 25 percent.

A second principal argument against the more discretionary view of the 25 percent rule derives from the overall legislative context and history. Interpreting the 25 percent rule to narrowly constrain only the final, sentencing table range is at odds with the fundamental, disparity reduction purpose of the SRA. Read in such a manner, the rule that Congress thought "of major significance" in achieving its intended disparity-reduction goals becomes of little real import in constraining Commission guideline construction or court sentencing decisions. For example, if it is accepted that the 25 percent rule applies only to the final sentencing table range, then there is no effective statutory limit on the choices the Commission could afford among offense levels or criminal history scores at intermediate stages of guideline application. Hence, under that view, the Commission could, if it chose, allow courts unlimited alternative choices for any or all determinations in the process of guideline application, so long as the final range was within the 25 percent limit. As a consequence, the aggregate effective variation in the sentencing range for defendants who in fact have the same guideline-significant offense and offender characteristics could far exceed the permissible 25 percent. Given the deep concern about unwarranted disparity that motivated the SRA, Counsel believes Congress hardly could have intended that result.

Statutory interpretation arguments aside, from a practical standpoint, the Commission should carefully consider the litigation that surely would ensue, as well as the political consequences of congressional review, if it

changes its view on the limitations of the 25 percent rule. Promulgation of guideline amendments affecting discretionary choices among offense levels would almost certainly provoke nationwide statutory compliance challenges by either the Department of Justice, adversely affected defendants, or both. 24Hence, it is recommended that prior to any revision in its view the Commission ensure that the Department would not challenge and, moreover, is prepared to vigorously defend such an approach. Moreover, the contention that a guideline system affording sentencing courts discretionary choices among an array of possible offense levels would result in less litigation at the district and appellate levels is somewhat debatable. For example, appellate courts initially would have to litigate and establish the appropriate standards of appellate review for such discretionary determinations, taking into account the review standards contemplated under 18 U.S.C. 3742. Additionally, appellate courts inevitably would face the daunting task of deciding when and how to create a common law of sentencing "gloss" distinguishing among permitted alternatives under the guidelines.

In summary, given the inherent litigation and political risks, if the Commission ultimately concludes that the 25 percent rule as presently interpreted is unduly constraining, perhaps the more prudent course would be to try to work out a legislative proposal that all of the principal parties believe will more effectively promote sound sentencing policy.

Level of detail, offense and offender characteristics

In setting forth a lengthy list of offense and offender characteristics for Commission consideration, 25*See* 28 U.S.C. 994(c), (d). the enabling statute hints at, but does not expressly describe, the level of detail Congress contemplated the guidelines would encompass. However, the accompanying Senate Judiciary Committee Report leaves little doubt that a quite detailed set of guidelines was expected. The Commission was to develop "a complete set of guidelines that covers . . . all important variations that may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." 26S. Rep. No. 225, *supra* note 2, at 168. As developed, the sentencing guidelines were expected to be considerably more detailed than, for example, the then existing U.S. parole guidelines. "The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors." 27*Id.* at 169. Thus, while sensitive to concerns that the guidelines not be so complex as to be unworkable, the Committee Report emphasized the desire for a rather intricate and comprehensive set of guidelines. (**Note**: A staff paper focusing more specifically on the level of detail in the guidelines is forthcoming.)

Under section 994(c), Congress listed the following seven factors, "among others," relating to offense seriousness that the Commission was to consider and build into the guidelines as the Commission deemed appropriate:

(1) offense seriousness grade, 28*See supra* note 11

(2) specific aggravating and mitigating circumstances,

(3) nature and degree of harm,

(4) community view of offense gravity,

(5) public concern about the offense,

(6) likelihood of achieving general deterrence, and

(7) local and national offense frequency.

Each of these factors was discussed in some detail in the Senate Judiciary Committee Report. 29S. Rep. No. 225, *supra* note 2, at 169-71.

Under section 994(d), Congress listed the following eleven offender characteristics, "among others," that the Commission should consider and build into the guidelines as the Commission deemed appropriate:

(1) age,

(2) education,

(3) vocational skills,

(4) mental and emotional condition,

(5) physical condition, including drug dependence,

(6) employment record

(7) family ties and responsibilities,

(8) community ties,

(9) role in the offense,

(10) criminal history, and

(11) criminal livelihood.

With respect to a number of the listed offender characteristics--education, vocational skills, drug dependence, employment record, family and community ties--the Committee Report expressly indicates that the Commission should treat the factor as "generally inappropriate" in determining whether and for how long to imprison; however, each of the factors nevertheless might be appropriate to other guideline determinations (*e.g.*, conditions of probation or supervised release). 30*Id.* at 172-74. **Note**: A staff paper discussing the manner in which the Commission incorporated offender characteristics into the guidelines is forthcoming.

The Commission was further instructed to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, and socioeconomic status of offenders." 28 U.S.C. 994(d). The intent of this provision was to "make it absolutely clear that it was not the purpose of the list of offender characteristics in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment of defendants of a particular race or religion, or level of affluence, or to relegate to prison defendants who are poor, uneducated, and in need of education and vocational training." 31*Id.* at 171.

Overall, the legislative history makes it clear that Congress wanted two factors--the seriousness of the offense and defendant prior record--to principally dictate the appropriate sentence under the guidelines regime. 32*Id.* at 161.

The relatively high level of detail expected under the guidelines is relevant also to the manner in which Congress believed the guidelines would further the goals of proportionality and individual fairness. By comprehensively taking into account the more important offense and offender factors relevant to sentencing and prescribing for them a uniform weight, it was expected that the guidelines actually would enhance the proper individualization of sentences. Each sentence would be "the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy." 33*Id.* Thus, contrary to what might be expected, guideline departure authority was not necessarily intended as the principal means of achieving an appropriate degree of individualized sentence. Rather, more typically, that goal was to be achieved through uniform application of a relatively detailed set of factors prescribed by the guidelines themselves (consistent with the "heartland" concept developed by the Commission and embodied in the guidelines).

Specific offender categories

In addition to the overarching constraints and more general directives previously described, Congress identified in the SRA four categories of offenders, according to the relative seriousness of their current offense and prior record, that span the spectrum of punishment severity.

a. Maximum imprisonment-career offenders. At the high end of the severity spectrum, Congress mandated that the guidelines provide at or near maximum authorized punishment for three-time violent offenders and/or drug

traffickers. 28 U.S.C. 994(h). The Commission has implemented this directive through the career offender guidelines, 4B1.1, 4B1.2. 34A recent Commission amendment redefining the manner in which the Commission views this directive is currently the subject of Department of Justice-initiated legal challenges.

b. Substantial imprisonment. Congress then identified five categories of particularly serious criminal conduct for which substantial terms of imprisonment would be appropriate. These categories include (1) offenders with a history of multiple, separate offenses, (2) offenders who engage in a pattern of criminal conduct as a livelihood, (3) managers or supervisors in concerted racketeering activity; (4) offenders who committed a violent felony while on bail release, and (5) substantial drug traffickers. 28 U.S.C. 994(e). In general, the Commission has complied with this directive by its assignment of appropriate offense levels and criminal history points for the various categories of offenders. Additionally, section 4B1.3 assures a minimum offense level of 13 for those who committed an offense as part of a pattern of criminal conduct engaged in as a livelihood.

c. Some imprisonment. Next, Congress indicated that the guidelines should reflect the "general appropriateness" of a prison sentence for violent crimes resulting in serious bodily injury, 28 U.S.C. 994(j). This directive has been carried out through the Commission's various choices of offense levels and specific offense characteristics.

d. No imprisonment. Finally, at the lower end of the punishment spectrum, the Commission was instructed to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *Id.* Implementation of this provision, which has been contested unsuccessfully by a number of defendants, 35*See, e.g.*, United States v. Davern, 970 F.2d 1490 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993); United States v. Ellen, 961 F.2d 462 (4th Cir.), *cert. denied*, 113 S. Ct. 217 (1992); United States v. Barrett, 937 F.2d 1346 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 322 (1991); has been approached through the assignment of offense levels and adjustments, as well as through the criminal history provisions (in which first offenders receive a criminal history score of zero). The Commission's manner defining what constitutes an "otherwise serious offense" clearly is a policy decision that is open to debate and possible Commission reconsideration.

Other specific circumstances

The SRA also gave the Commission instructions about how the guidelines should account for (1) multiple offenses 36[28 U.S.C. 994(a)(1)(D), (i). (reflected by the Commission in Chapter Three, Part D, 5G1.2 and 5G1.2) and (2) substantial assistance (reflected in 5K1.1). 37*Id.*, section 994(n). This provision was added by the Anti-Drug Abuse Act of 1986, which simultaneously added 18 U.S.C. 3553(e). Finally, the Commission was instructed to ensure that the guidelines reflect the inappropriateness of using prison sentences to achieve rehabilitative goals, 38*Id.*, section 994(k). a directive that the guidelines arguably achieve by expressly basing imprisonment determinations on other, permissible offense and offender characteristics.

Guideline Development and Amendment Processes

The SRA provided instruction and guidance to the Commission designed to ensure an open, widely consultative process of guideline development and periodic revision. *See* 28 U.S.C. 994(x) (relating to public notice and comment), (o) (relating to consideration of views and reports from institutional participants in the criminal justice system and others), and (p) (prescribing the timing and procedures for amendments). Additionally, the SRA instructed the Commission to ensure that those processes reflected appropriate consideration of data about past sentencing practices (28 U.S.C. 994(m)) and prison impact (28 U.S.C. 994(g)). 39Commission compliance with the directive of section 994(g) to formulate the guidelines so as to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission" has been challenged unsuccessfully by a number of defendants. *See, e.g.*, United States v. Martinez-Cortez, 924 F.2d 921 (9th Cir. 1991); United States v. Foote, 898 F.2d 659 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 112 (1990); United States v. Erves, 880 F.2d 376 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 416 (1989); United States v. White, 869 F.2d 822 (5th Cir. 1989), *cert. denied*, 109 S. Ct. 3172 (1989).

Post-SRA Mandates and Constraints

Subsequent to enacting the SRA, Congress has continued to instruct the Commission, sometimes generally and sometimes very specifically, about how the guidelines should be amended to achieve desired sentencing goals for specified categories of offenders. While the Commission did not initially suggest this means of congressionally affecting sentencing policy through the guidelines, it has expressly and regularly encouraged it

as an alternative to mandatory minimums. 40Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 118-124 (August 1991). Congress's use of mandatory minimums since the advent of the guidelines has been uneven; however, in general, it is fair to say that Congress often has opted to employ guideline-related directives to the Commission in lieu of originally proposed statutory minimum sentences. Thus, at a cost to the Commission's discretion and the introduction of some policy results that the Commission might view as in tension with the overall guideline rationale, this approach has been moderately successful in mitigating the introduction of new mandatory minimums.

The post-SRA directives to the Commission are numerous and sometimes quite detailed. *See* Appendix A enumerating them as a summary listing, categorized by statutory source:

Pending Legislation

The legislative trend of affecting sentencing policy in part through detailed directives to the Commission appears to be continuing in the current Congress. A bill, H.R. 1240, passed by the House and Senate in slightly different forms, directs the Commission to further increase offense levels for various child pornography offenses, add an enhancement for the computer transmission of pornographic materials, and submit a report to Congress. A pending terrorism bill, H.R. 1710, directs the Commission to broaden its recently promulgated, international terrorism enhancement to cover domestic terrorism incidents, while the Senate counterpart, S. 735, directs the Commission to enhance penalties for damaging a federal interest computer. Should the Congress enact another comprehensive crime bill, additional directives may well be considered.

Implications of Post-SRA Legislation on Guideline Simplification

In addition to their effective substitution, in many instances, for mandatory minimums, the aforementioned existing and likely future directives to the Commission have other substantial implications for guideline simplification that should be carefully considered. First and foremost, the directives indicate areas of special sentencing policy concern to Congress. How best to incorporate the numerous general and specific directives into a revised guideline structure (absent their possible modification by Congress) may be a complicated matter. In this regard, some--but not all--of the directives expressly anticipate the possibility of future Commission amendments to the guidelines structure and instruct the Commission, in the event such changes are proposed, to implement the instruction so as to achieve a comparable result.

Clearly, an offense specific or larger categorical basis, Congress has shown no hesitancy about commanding the Commission to add additional specific factors to the guidelines. Even in the face of some Commission arguments suggesting an insufficient empirical basis for such specific enhancements, Congress sometimes has seen fit to insist on the inclusion of new sentencing factors. Certainly, these political realities and tendencies must be considered as the Commission proceeds with its simplification project.

Possible Statutory Revisions

This discussion of the basic SRA framework and subsequent congressional embellishments of it may suggest a number of possible approaches that the Commission wishes to explore. These could include, for example, legislative modification of the 25 percent rule, amendment of the departure and/or appellate review standards, or other changes. Counsel stands ready to draft any options that the Commission wishes to pursue. However, because even the consideration of possible statutory changes may have political repercussions, it; was felt best to seek guidance from the Commission before statutory revision options are presented.

APPENDIX A: Post-SRA Directives to the Sentencing Commission

Anti-Drug Abuse Act of 1988, Pub. L. 100-690

(1) Minimum offense levels for certain defendants convicted of operating common carriers while intoxicated--*see* 2D2.3.

(2) Enhanced and minimum offense level for introducing drugs into prisons--*see* 2P1.2(c)(1).

(3) Enhanced and minimum offense level for drug trafficking involving minors--*see* 2D1.2.

(4) Enhanced and minimum offense level for drug importation by aircraft or boat--*see* 2D1.1(b)(2).

Major Frauds Act of 1988, Pub. L. 100-700

(5) Enhanced penalty for fraud resulting in conscious or reckless risk of serious injury--*see* 2F1.1(b)(4).

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73

(6) Enhanced penalties for frauds substantially jeopardizing financial institutions--*see* 2F1.1(b)(6)(A).

Crime Control Act of 1990, Pub. L. 101-647

(7) Enhanced penalties for smokable crystalline methamphetamine (ice) offenses--*see* 2D1.1

(8) Minimum offense level for major bank frauds--*see* 2F1.1(b)(6)(B).

(9) Enhanced offense levels for child kidnapping--*see* 2A4.1.

(10) Enhanced penalties for sexual crimes against children--*see* 2A3.1, 2A3.2, 2A3.4.

FY 1992 Treasury, Postal Service Appropriations Act, Pub. L. 102-141

(11) Enhanced and minimum offense level for child pornography offenses--*see* 2G2.2, 2G2.4, 2G3.1. **Note**: This series of instructions mandate that the Commission reverse certain amendment decisions submitted to Congress earlier in the 1991 amendment cycle.

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322

(12) Enhanced offense levels for hate crimes--*see* 3A1.1, effective November 1, 1995.

(13) Report to Congress and enhanced penalties for fraud against older victims--*see* 3A1.1(b), as amended effective November 1, 1995. **Note**: The required report to Congress was submitted March 13, 1995.

(14) Enhanced penalties for violent crimes against older victims--*see* 2A3.1, 2A3.3, 2A3.4, 3A1.1, as amended effective November 1, 1995.

(15) Enhanced penalties for drug trafficking in truck stops, rest areas--*see* 2D1.2.

(16) Enhanced penalties for involving minors in crime--*see* 3B1.4, as promulgated effective November 1, 1995.

(17) Enhanced penalties for terrorist crimes--*see* 3A1.4, as promulgated effective November 1, 1995.

(18) Enhanced penalties for firearms possession by violent felons or serious drug offenders--see 2K2.1.

(19) Enhanced penalties for using firearm in commission of counterfeiting or forgery--*see* 2B5.1, 2F1.1, as amended effective November 1, 1995.

(20) Enhanced penalties for second offense of using explosive to commit felony--*see* 2K2.4, 4A1.1, 4A1.2.

(21) Enhanced penalties for use of semiautomatic firearm during crime of violence or drug trafficking--*see* 2D1.1, 2K2.1, 5K2.17, as amended effective November 1, 1995.

(22) Enhanced penalties for illegal drug use in prisons and smuggling into prisons--*see* 2D1.1, 2D2.1, as amended effective November 1, 1995.

(23) Enhanced penalties for drug trafficking in protected locations--*see* 2D1.2.

(24) Reduced penalties for nonviolent, low-criminal history drug traffickers ("Safety Valve")--*see* 5C1.2. **Note:** As amended effective November 1, 1995, 2D1.1 provides an additional two-level reduction for offenders meeting the safety valve criteria and whose offense level is 26 or greater. The amendment thereby

coordinates the minimum of the guideline range for the least culpable drug trafficking defendant with the 24-month sentence floor established in the directive to the Commission.

(25) Report to Congress and amendments relating to intentional transmission of the HIV virus. **Note:** The report was submitted March 13, 1995. No amendments were deemed immediately necessary.

(26) Report to Congress and amendments regarding sexual offenses. The report was submitted March 13, 1995. *See* 2A3.1, as amended effective November 1, 1995.

(27) Report to Congress and recommendations regarding cocaine offenses. The report was submitted February 28, 1995. *See* 2D1.1, as amended effective November 1, 1995.

United States Sentencing Commission

DOCS Fact Sheet

PRISON CLOSURE

Overview

New York's prison population has dropped by about 13 percent in the last eight years. From a peak of nearly 71,600 in 1999, the number of inmates has decreased to below 62,500 – a drop of more than 9,000. The trend is expected to continue. By the end of the next fiscal year, March 31, 2009, the inmate population is projected to be 300 lower than it is today.

The population decline has resulted from a steady drop in crime and the implementation of appropriate early release programs mandated by the State Legislature.

Given the declining prison population and the State's projected budget deficits, Governor Eliot Spitzer in January 2007 called for a review of New York's 69 prison facilities and consideration of possible closures. Although the State Legislature rejected the Governor's proposal to create a prison closure commission, the Department of Correctional Services (DOCS) undertook an internal review of the issue. Based on that review, DOCS intends to close three correctional facilities and a portion of a fourth in January 2009: **Hudson**, a medium-security prison in Columbia County; the minimum-security camps **Pharsalia** (Chenango County) and **Gabriels** (Franklin County); and **Camp McGregor**, the minimum security camp portion of Mt. McGregor Correctional Facility (Saratoga County). Hudson's Work Release component will remain open.

Competing Priorities

While the overall number of inmates has declined in recent years, a new set of costly mandates took effect in April 2007. The courts required extensive new treatment programs for mentally ill inmates by approving settlement of a lawsuit brought by the public interest and advocacy organization Disability Advocates Inc. And the State Legislature required expanded treatment programs for incarcerated sex offenders as part of the Sex Offender Management and Treatment Act (SOMTA). Those mandates require DOCS to hire 375 new employees at an annual cost of approximately $20.6 million and to spend $70 million for associated capital projects over two years. Coupled with the ever-increasing costs to provide medical services to inmates, these new required expenditures demand cost-effective management decisions.

Changes in the Law

From the late 1980s and throughout the 1990s, the State Legislature approved the appropriate early release of non-violent offenders through the Shock Incarceration, Work Release, Comprehensive Alcohol and Substance Abuse Treatment (CASAT) and Willard Drug Treatment programs, as well as Merit Time.

In 2004, the State Legislature modified the Rockefeller Drug Laws to:

- Create Supplemental Merit Time, which allows drug offenders serving indeterminate sentences to earn an extra 1/6 credit off their minimum sentences for good behavior and the achievement of certain milestones involving treatment, educational, training and work programs.
- Allow A-1 and A-2 drug offenders to apply to the courts to be re-sentenced.
- Require determinate (fixed) sentences for new drug offenders.

From 1995 through 2007, Rockefeller Drug Law reform and the earlier statutory changes resulted in the appropriate early release of 87,528 offenders, on average 8.4 months earlier than had the laws remained unchanged. That resulted in the need for 5,064 fewer DOCS beds during that time.

In addition, drug commitments peaked in 1992, when DOCS received 11,225 drug offenders from the courts. That number dropped to 9,810 by 1997 and to 6,148 by 2007.

Average time served for drug crimes also dropped. Drug offenders served 36 months on average from 2003 through 2005, only 30 months in 2007.

Changing Demographics, Changing Configurations

The early releases triggered by changes in the law plus longer determinate sentences for violent felons resulted in a larger proportion of violent offenders in the inmate population.

While the number of inmates housed at maximum security prisons increased by 18 percent from 1996 through 2007, the number of inmates at medium security prisons decreased by 18 percent and the number at minimum security facilities dropped by 47 percent. In 1996, violent felony offenders accounted for 51.3 percent of the system. By the end of 2007, they made up 57.9 percent. Conversely, drug offenders made up 35 percent of the prison population at the end of 1994 and only 21 percent by the end of 2007.

The higher need for maximum security space prompted the construction of nearly 5,000 new maximum security beds in the last decade. That more than offset the downsizing of medium- and minimum-security facilities between 2000 and 2003 at Groveland Camp and the annexes at Wyoming and Mid-State Correctional Facilities, the closure of Parkside Correctional Facility and Tappan (the medium security section of Sing Sing Correctional Facility), and the consolidation of dormitories at six other facilities to adjust to the lower need for medium and minimum security space.

In all, DOCS has taken down or designated for emergency use 6,228 medium security and minimum security beds. But as noted, DOCS' inmate population dropped by more than 9,000.

Closure Considerations

Maximum security facilities, shock incarceration camps and facilities that provide court- and legislatively-mandated drug treatment programs, sex offender counseling services and enhanced mental health and/or medical services are not suitable for closure at this time.

But minimum-security camps are. They no longer serve the function they did 20 years ago. By law, only inmates 24 months to release can be placed at camps, and those inmates are typically in need of the kind of reentry services such as educational, vocational, skill building and treatment programs that camps provide only on a minimal basis. Also, program requirements for Merit Time, Supplemental Merit Time and conditional release, as well as medical and mental health services, are not as available at camps. Inmates that would have been placed in camps 20 years ago are now sent to programs with proven track records of success such as CASAT and Shock. Some minimum security camps now have vacant dormitories.

The facilities that will be closed house few inmates in relation to their capacity, will have the least negative impact on the overall operation of the Department and will allow for the redeployment of staff with the opportunity for transfer to nearby facilities or other nearby state agencies. Hudson, in particular, faces costly capital investment needs.

Cost Savings by Facility to be Closed

Hudson (422 general confinement beds), savings of $15.7 million in annual operating costs and $21,755,000 by avoiding needed five-year capital project costs. The Hudson Work Release Program will continue to operate with its current capacity of 55. It serves inmates in the Capital District. The Work Release Building will also continue housing up to 65 inmates in the Industrial Training Program in the Department's Division of Support Operations, and Correctional Industries as part of the agency's Temporary Release and Re-entry Programs.

Camp McGregor (300 beds; approximately 150 inmates), savings of $4.2 million in annual operating costs and $310,000 in capital construction needs. The medium security portion of Mt. McGregor Correctional Facility will continue to operate.

Camp Pharsalia (258 beds; approximately 165 inmates), savings of $6 million in annual operating costs and $2,270,000 in capital-cost avoidance.

Camp Gabriels (336 beds; approximately 187 inmates), savings of $9 million in annual operating costs and $5,299,000 in capital construction needs.

Annual operating cost savings are based on the 2009-10 State fiscal year, the first full year the closures will be in effect.

Combined, the closures are expected to save about $10.4 million in operating costs in 2008-09 and approximately $33.5 million in 2009-10, plus more than $29.6 million by avoiding major capital construction projects. Those savings will help cover the cost of the new mental health and sex offender programs and help DOCS manage the state prison system within its budget.

Process

Correction Law 79-a and 79-b require DOCS to:

- Announce its intent to close any facility at least a year ahead of time to all employee labor organizations and other employees and to any local governments in which the facility is located.
- Develop strategies that attempt to minimize the impact of the closures on the State workforce in consultation with the State Department of Civil Service, the Governor's Office of Employee Relations and any other appropriate State agencies.
- Develop strategies to minimize the impact of closure on the local and regional economies in consultation with the State Department of Economic Development and other appropriate State agencies.
- Provide a report at least six months before closure for a re-use plan for any prison facility slated for closure, developed in consultation with the above-listed agencies. That plan must consider the potential to use the facility for another State or local government purpose or to sell it to a private entity for development as a tax-generating business, residential or other purpose. DOCS also intends to consult with appropriate local officials.

Conclusion

At a time when program and treatment needs are increasing and the prison population continues to decline, closing these four correctional facilities is the most sensible policy for the taxpayers of New York and the operation and effective management of the Department of Correctional Services.

January 2008

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Associated Press

Law Curbing Inmates' Lawsuits Questioned

By DAVID CRARY – 1 hour ago

NEW YORK (AP) — As longtime chairman of the American Conservative Union, David Keene seems an unlikely ally of the American Civil Liberties Union in a prisoners-rights campaign. But this cause is personal.

Keene's son, also named David, is serving time in a federal prison for firearms offenses arising from a 2002 road-rage incident. The son's stymied efforts to lodge complaints have prompted the father to join a liberal-dominated coalition seeking to ease a tough law restricting inmates' ability to file lawsuits.

Along with such advocacy groups as the ACLU, Human Rights Watch and the Open Society Institute, Keene is urging revision of the Prison Litigation Reform Act that Congress enacted in 1996 to curtail frivolous lawsuits by state and federal prisoners.

"The act accomplished part of its purpose, but I don't think the authors foresaw the unintended consequences," the elder Keene said in a telephone interview from his Washington, D.C., office. "It's Congress' job to go back and fix it."

Backers of the act, known as the PLRA, often cited a case in which an inmate sued because he received a jar of crunchy peanut butter instead of the creamy variety he preferred.

The act's impact is dramatic; prisoner lawsuits in federal courts have dropped from roughly 41,000 in 1995 to less than 25,000 annually even while the inmate population surged from 1.5 million to more than 2 million. But critics say many legitimate cases have been blocked — including numerous grievances involving rape and violations of religious freedom.

"It's important to recognize what an extraordinary piece of legislation this is," said David Fathi, director of U.S. programs for Human Rights Watch. "It takes an unpopular, politically powerless group and makes it more difficult for them, and only them, to protect their constitutional rights."

Criticism of the PLRA is intensifying. The American Bar Association has endorsed reform or repeal of several key provisions, and in November the House Judiciary subcommittee on crime invited critics to a hearing on the issue.

Among the witnesses, along with Keene, was Garrett Cunningham, a former Texas inmate who told the panel of repeated sexual assaults by a guard. Cunningham said he was prevented from filing suit by the PLRA's requirement that a prisoner first comply with in-house grievance procedures.

"Prisoners who file a complaint encounter a complicated grievance system that few prisoners can navigate," Cunningham testified. "But you are shut out of court forever if you cannot figure out how to get your grievance properly filed within a few days of the rape."

Another witness was Pat Nolan, a vice president of the Prison Fellowship Ministries founded by former Watergate figure Chuck Colson. Nolan was a longtime Republican legislator in California who served two years in federal prison in the 1990s after pleading guilty to racketeering.

The PRLA's impact on religious freedom is a particular concern to Nolan. He has documented cases where prison officials have denied Bibles to inmates and refused kosher meals to Orthodox Jewish inmates.

Nolan believes members of Congress, particularly conservatives, can be swayed by the personal stories that he and Keene provide regarding inmates' rights.

"It's easy to subconsciously marginalize people who are different," Nolan said. "But David and I could be one of them. They look at what happened to me and to David's son, and think 'My goodness, there but for the grace of God go I.' We bring it home to them."

Among the concerns about the PLRA:

_The act bans awards of compensatory damages for mental or emotional injury suffered in custody "without a prior showing of physical injury." Critics say this has thwarted valid complaints that don't entail physical injury, including religious freedom violations.

_The act bars lawsuits by inmates who have failed to exhaust their prisons' internal grievance procedures no matter how difficult such compliance might be. Washington University law professor Margo Schlanger says this provision encourages prison authorities "to come up with ever higher procedural hurdles in order to foreclose subsequent litigation."

_The act covers juvenile offenders. Critics want to exempt them, contending that juveniles are less able than adult inmates to follow the complex provisions for filing suit.

Following the November hearing, the subcommittee chairman, Rep. Bobby Scott, D-Va., introduced a bill that would address the critics' concerns while maintaining basic curbs on frivolous suits. He is seeking bipartisan support and hopes at least some parts of his bill may win approval this year.

Without the changes, said Elizabeth Alexander of the ACLU's National Prison Project, "we risk the return, on a massive scale, of

brutal and disgusting prison conditions that have no place in our scheme of justice."

At the hearing, the only testimony against revision of the PLRA came from a Justice Department official, Deputy Assistant Attorney General Ryan Bounds. He said the act has succeeded in winnowing out frivolous suits, permitting legitimate ones and also sparing prison officials from "judicial micromanagement."

But David Keene said his son's experiences have convinced him that some prison officials deliberately manipulate grievance procedures to thwart potential lawsuits.

"You get locked up for breaking the rules, and then you discover that the people who locked you up don't have to follow them," he said.

In one case, Keene said, his son complained after prison officials opened mail from his lawyer that was entitled to confidentiality. When the complaint reached court, it was dismissed because the son could show no physical damage, according to Keene, who says his son was subsequently "roughed up" by guards.

Keene's son, 26, is serving a 10-year sentence at a medium-security federal prison in Butner, N.C., with a projected release date in September 2011.

"He's one of those guys who knows the rules," the elder Keene said. "If he feels wronged, he complains. They don't like that."

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DAVID KEENE

Rule-breakers, inside and out

By David Keene
Posted: 03/03/08 05:29 PM [ET]

America's jails and prisons are bursting at the seams and new ones are being built at an amazing pace to house violent, non-violent, white collar and miscellaneous miscreants being shuttled through our courts at an ever-increasing rate. Governors in state after state are wondering just how to pay for the prisons they're being forced to build and those who run our prisons and jails are hard-pressed to find qualified correctional officers to guard the growing army of inmates under their control.

Just last week, figures released by the government revealed that more than one in a hundred adults in this country are serving time in jail or prison. That's the highest percentage of citizens of any nation in the world and it's growing.

People are incarcerated for breaking society's rules or laws both to punish them and to protect the public from them, and to let others know that those who break the law will pay for doing so. When they leave the courtroom for prison, victims and prosecutors often breathe a sigh of relief, knowing that at the very least they won't be preying on the innocent while they're locked up. Everyone hopes that by the end of their incarceration, miscreants "will have learned their lesson" and return to society determined not to repeat their mistakes.

The evidence suggests otherwise. While incarcerating dangerous and career criminals reduces crime just by keeping them off the street, prisons don't do a very good job of rehabilitation. This should be of greater and greater concern these days because in the next few years literally hundreds of thousands of prisoners will be released and the fear is that a very high percentage of them will end up terrorizing someone before being rearrested and sent back.

Our prisons house more than a few men and women who cannot be saved, but many can. In failing them, our prisons are failing the society building these human warehouses.

A few weeks ago, I joined a number of others testifying before the House Judiciary Committee supporting changes in a law known as the Prison Litigation Reform Act or PLRA. The PLRA was passed in 1996 to deal with a flood of frivolous lawsuits filed by prisoners complaining about just about everything. The new law made it far more difficult to file such suits by requiring, a) that prisoners exhaust all administrative remedies available to them before going to court and b) denying prisoners access to the courts under any circumstances unless they could demonstrate actual physical injury as a result of the alleged mistreatment.

The law worked in the sense that it cut down on prisoner's lawsuits, but it had the unintended consequence of virtually insulating prison officials from external oversight and denied prisoners access to the courts for all but the most grievous mistreatment. Even prisoners raped by rogue guards have been denied access to the courts because they couldn't demonstrate real physical injury resulting from the rape.

Judiciary Committee Chairman Bobby Scott (D-Va.) held the hearing to see how the law is working and what might be done to eliminate the unintended consequences without once again opening the courts to thousands of frivolous or even malicious lawsuits.

The witnesses testifying urged a number of reforms. The most important were eliminating the physical injury requirement, which allows guards and prison officials to ignore a prisoner's rights and their own rules because they know they can do anything they want short of inflicting observable physical injury; softening the requirement that a prisoner "exhaust" an administrative review procedure that is often run not to remedy abuses but to keep prisoners "in their place."

Any other governmental agency that promulgates rules governing its own behavior must follow those rules, but it is well documented that prison officials can and often do ignore their own regulations because prisoners have no recourse and no one on the outside can do anything with the knowledge either. Prisoners who ask that the rules be followed are simply told the written or official rules don't matter.

Most prisoners may not be rocket scientists, but they learn a lesson from all this. They realize that while they are in prison for breaking society's rules, those with real power can and do act exactly as they please in flagrant violation of the very rules they are paid to enforce and observe.

That's a lesson we shouldn't be teaching.

Keene, chairman of the American Conservative Union, can be reached at Keeneacu@aol.com.

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MEMORANDUM

TO: U.S. House of Representatives Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

CC: ACLU National Prison Project and National Disability Rights Network

FROM: MaryBeth Musumeci, Deputy Legal Advocacy Director, Disabilities Law Program, Community Legal Aid Society, Inc. MBM

DATE: April 18, 2008

RE: Prison Abuse Remedies Act, H.R. 4109

In response to the request from the National Disability Rights Network (NDRN) for written testimony regarding the need for the Prison Abuse Remedies Act (H.R. 4109) from a disability perspective, the Disabilities Law Program (DLP) offers the following comments. The DLP is the statewide protection and advocacy agency for people with disabilities in Delaware and a member of NDRN. While the DLP's comments focus on the modification of the exhaustion requirement, the DLP also supports the other provisions of the Prison Abuse Remedies Act.

I. Modifying the Exhaustion Requirement of the Prison Litigation Reform Act.

The Prison Litigation Reform Act (PRLA) prevents a prisoner from filing suit in federal court unless the prisoner has exhausted all administrative remedies and grievance procedures made available by the correctional facility. Failure to exhaust all remedies, and to do so in compliance with the correctional agencies' deadlines and procedural rules, results in the dismissal of prisoner lawsuits without recourse.

In Delaware, it is extremely difficult, if not impossible, for prisoners to comply with administrative procedures. The state prison grievance system has short deadlines and complicated procedures which prisoners must navigate without legal counsel, because the state prison system does not permit prisoners to be represented by legal counsel in the grievance process. Moreover, the grievance process itself is contained in a state policy memo which by state statute is kept confidential. Thus, prisoners do not even have access to the rules of the administrative grievance process with which the PRLA requires them to comply. Prisoners with disabilities are often ill-equipped to comply with the prison grievance system. In the DLP's experience in Delaware, even when prisoners do file grievances, they often do not receive a response.

Section 3 of the Prison Abuse Remedies Act preserves the PLRA's goal of promoting administrative resolution of disputes, while preventing the dismissal of meritorious claims purely for failure to exhaust. Section 3 provides that before filing suit, a prisoner must present his or her claim to prison officials. If a prisoner files a claim without first presenting to prison officials (and the court does not dismiss the claim as frivolous or malicious), the court must stay the case for up to 90 days and direct prison officials to consider the claim through administrative processes. Cases that are not resolved administratively during the 90 day period will then proceed in court, unless the court is notified by the parties that the case is resolved.

In the DLP's experience, the proposed modification of the PLRA's exhaustion requirement is a much needed remedy so that prisoners with disabilities can obtain meaningful relief for meritorious claims. Over the past several years, the DLP has

represented multiple prisoners who are deaf who require interpreter services to ensure effective communication and who have been held in state prisons without any access to interpreter services. Many people who are deaf are not fluent in written English. People who have been deafened at birth or a young age and educated at schools for the deaf typically consider their first language to be American Sign Language (ASL), not English. ASL does not directly correlate with English. It has a different syntax and grammatical structure and is akin to a foreign language as compared to English. There is no written component to ASL. This creates obvious barriers to compliance with the prison grievance system.

The healthcare context is one area in which the provision of interpreter services is crucial. The failure to provide interpreter services in the healthcare context for people who are deaf creates unacceptable and unnecessary risks. Misunderstandings can arise on behalf of the physician, who may misdiagnose problems when a deaf patient cannot communicate his symptoms and understand the physician's questions, and on behalf of the deaf patient, who may be unable to understand and comply with the physician's instructions. For example, the DLP is aware of a deaf client with minimal language skills who was denied a mental health screening because prison staff did not know how to communicate with him. Another client, who is profoundly deaf and communicates in ASL, was sentenced to months of a drug treatment program at a violation of probation center and work release center, during which no interpreter services were provided, with the result that, although he sat in treatment groups all day, he was unable to communicate or participate.

The DLP has represented a deaf client who has been held at multiple state prison facilities. The client's first language is ASL, and his ability to communicate in written English is extremely minimal. Despite numerous grievances filed at each facility over six months, this client was provided with interpreter services only once during this period of incarceration and only after considerable advocacy with the deputy attorney general for the state Department of Correction.

The failure to provide interpreter services in this context is of particular concern, since without ever meeting with this client with an interpreter, prison medical staff somehow diagnosed him with a mental health condition and began medicating him daily. The client did not know the name of the medication or the reason that he was taking it. Some days, he received two pills, and some days, he received one pill, and without an interpreter, he had no way to ask questions or effectively communicate with prison medical personnel. He also complained that the medication was making him dizzy and disoriented. Despite these serious concerns, which were brought to the state Department of Correction's attention through the inmate grievance process and through direct advocacy with the deputy attorney general for the Department, six weeks elapsed during which this client was being medicated and experiencing side effects before he was provided with an interpreter for a doctor's appointment.

In all of the cases described above, the PRLA's administrative exhaustion requirement adversely affected people with disabilities – because they were unable to successfully navigate the grievance system and because the prison often did not respond accordingly. The PRLA's exhaustion requirement also adversely affected the ability of

DLP attorneys to protect these clients because the PRLA's exhaustion requirement hindered the DLP's ability to address dangerous conditions and practices that put people with disabilities at risk.

II. The Legal Basis for Interpreter Services in the Healthcare Context for People Who are Deaf in State Prison Facilities.

The claim for interpreter services to ensure effective communication in the prison context is well-supported by the law. The Americans with Disabilities Act (ADA) requires that state prisons ensure effective communication with people who are deaf.[1] Specifically, public entities, such as state prisons, must "take appropriate steps to ensure that communications with [people] with disabilities are as effective as communication with others."[2] The ADA also requires that public entities "shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."[3] Auxiliary aids and services under the ADA

[1] Title II of the ADA prohibits public entities (state and local government) from discriminating against persons with disabilities. *See* 28 CFR § 35.130. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by any [public] entity." 42 U.S.C. § 12132. The United States Supreme Court has held that Title II of the ADA applies to state prisons. *See Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998).

[2] 28 CFR § 35.160 (a).

[3] 28 CFR § 35.160 (b) (1). Public entities may not impose surcharges on individuals with disabilities in order to cover the costs of accommodations. 28 C.F.R. § 35.130 (f).

include "qualified interpreters."[4] "In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities."[5]

> The U.S. Department of Justice's comments to the Title II regulations note that
>
> [a]lthough in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.[6]

The U.S. Department of Justice, in its comments to the ADA Title III regulations, asserts that "[i]t is not difficult to imagine a wide range of communications involving areas such as *health*, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for effective

[4] 28 CFR § 35.104.

[5] 28 CFR § 35.160 (c). Under the ADA,

> [w]hen an auxiliary aid or service is required, the public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual. 'Primary consideration' means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens.

ADA Title II Technical Assistance Manual, § II-7.1100.

[6] 28 CFR Pt. 35, App. A, 56 FR 35696 (July 26, 1991).

communication."[7] The U.S. Department of Justice recognizes that qualified interpreters are necessary to ensure effective communication or avoid discrimination against people who are deaf in the prison context, including *inter alia*, for medical and psychological assessments and treatment.[8]

For the above reasons, the DLP supports the amendments to the PRLA proposed in the Prison Abuse Remedies Act. Thank you for your consideration of the DLP's comments.

[7] 56 Fed. Reg. at 35567 (emphasis added).

[8] *See* Settlement Agreement between the United States of America and the Wood County Sheriff's Department, Bowling Green, Ohio, DOJ Complaint No. 204-57-100 (June 5, 1997) at page 3, item # 4.

The New York Times nytimes.com

March 14, 2004

The Good Jailer

By DAVID SHEFF

On a sunny winter afternoon, Warden Jeanne Woodford walked the grounds of San Quentin State Prison on the San Francisco Bay. The prison officers wore green-and-khaki uniforms and inmates were in faded blue work shirts and jeans or orange jumpsuits, but Woodford was fashionably dressed in an olive green wool skirt and cream V-neck sweater. Her auburn-and-gold hair was clipped short. There was a pair of diamonds in each ear, more diamonds on her fingers and a gold chain around her neck. Woodford, who is 50 years old and 5-foot-7, was, as usual, unarmed. She walked past throngs of prisoners, and though she was the first female warden in San Quentin's 152-year history, and all 5,600 inmates were male, there was not a catcall or whistle. Inmates greeted her, "Good afternoon, ma'am," "Godspeed, Mrs. Woodford" and "Yo, Miss Warden."

The prison was bustling with purposeful activity. In the education building, inmates studied for their high-school equivalency examinations and college degrees. In factories, they learned to operate computer-controlled lathes, printing presses and milling machines. Two men pruned a Monterey Cypress tree in the chapel yard. Prisoners in a fathering course practiced reading Dr. Seuss to one another.

When Woodford walked through one of the prison's main corridors, she came upon a group of men who were heading back to their cells. She approached an inmate wearing a knit cap over ropy braids whom she recognized as a recent arrival and asked, "How are you getting along?" She looked closely at his face. "How old are you, anyway?"

"Twenty-three, ma'am," he said, his eyes cast downward.

Woodford asked about his family, and as he mumbled the answers ("I got a wife at home, and one baby son"), she gazed at him with what appeared to be motherly concern. "You are too young to be here, and your son needs you home," she said. "I hope that you take advantage of your time here so that you won't be coming back." She added: "Please let me know how things go. I'll check in on you."

When she was out of earshot, he turned to an inmate. "Who the -- ?"

"She?" responded the longtime prisoner, indicating the warden's retreating figure. "She is Jeannie Woodford. I been in every joint around, ain't never seen nothing like her."

Woodford is a warden of the old school -- not the really old school of her San Quentin forebears, who considered chaining prisoners in a dungeon useful therapy, but the one that attributed criminality to psychological and social forces and considered it a prison's job to address those factors. The ranks of wardens who believe that even felons convicted of unspeakable crimes can change for the better, given enough instruction, counseling and perhaps (at least in Woodford's case) maternal admonishing, have thinned in the last few decades. Most wardens strive only to control and house their share of the nation's growing prison population, which, in the last 20-odd years, has quadrupled, to 2.1 million people. In California, the word "rehabilitation" was expunged from the penal code's mission statement in 1976. Since then, prison officials have been exhorted to punish, and they have fulfilled that mandate in new,

Working within a system that has been plagued by corruption and violence, Woodford is accustomed to being judged a naïve, criminal-coddling do-gooder, and she doesn't seem to mind it. Her zeal for rehabilitation has a quasi-religious underpinning. "For her, there are no irredeemable souls," said Barry Zack, director of Centerforce, an organization that provides services for prisoners and their families. This made it all the more astonishing when, last month, she was tapped to run the beleaguered California Department of Corrections by the state's Republican, tough-on-crime, tough-on-criminals governor, Arnold Schwarzenegger.

While, in the end, Woodford was won over by the challenge of carrying out reforms throughout the state, the scale of the job at first scared her. She worried that she could lose touch with the people in the system. She told me, "I don't want to forget that this is about people -- about humanity."

Saving money, not souls, is Schwarzenegger's main motivation for turning to Woodford to run the nation's largest state prison system, with 32 penitentiaries, 49,247 employees and 161,500 inmates. On average, it costs about $31,000 a year to care for each prisoner. Two-thirds of those who are released end up back in prison within 18 months, twice the national average. Only Utah has a worse record. Schwarzenegger, with a $14 billion deficit to contend with, reasons that Woodford's philosophy -- Same man, same result; changed man, changed result -- will mean more parolees staying on the straight-and-narrow, which translates into fewer bodies on the state dole.

The Department of Corrections doesn't track recidivism rates by prison, so there's no statistical evidence that San Quentin's prisoners adjust to life outside bars better than those from other state prisons, but a body of research shows that the more education and rehabilitation programs a prisoner goes through while incarcerated, the less likely it is that he will commit another crime. When they met before her appointment, Schwarzenegger grilled Woodford about San Quentin's unusual range of offerings and charged her with exporting them throughout the state. "She addressed substance abuse, mental illness, lack of education and other factors that drive criminality," said Roderick Hickman, the governor's cabinet secretary overseeing corrections and now Woodford's boss. "And she did it without cost to the state." She has also been untouched by the recent spate of scandals involving, among other things, prison officials who have been accused of trying to cover up violence provoked by prison officers. "She brings credibility to an organization that sorely needs it," Hickman added. "We have an integrity deficiency, and we need to fix it."

With little money, Woodford created programs at San Quentin by relying almost entirely on nonprofit agencies and about 3,000 volunteers a month -- a number unsurpassed in any other U.S. prison. Volunteers conduct a gospel choir, lead group-therapy sessions, coach sports, instruct classes in art and comparative literature and teach "positive parenting" courses. The programs have been dismissed as an aberration -- made possible only because of San Quentin's location in, as Democratic State Senator Gloria Romero calls it, "the People's Republic of San Francisco, an island of liberal support for the humane treatment of prisoners."

It is indeed hard to imagine thousands of volunteers turning out in less populated and less liberal regions of the state to teach anger management to murderers. Woodford, however, plans to recruit them. "Yes, the scale of what we were doing at San Quentin was unique," Woodford said. "Honestly, many people in the department wanted to do the kinds of things we were doing, but it wasn't the right environment. There wasn't the support. Now there will be." Even if she succeeds in finding volunteers, however, she will have other challenges. She could be hamstrung if the state doesn't provide some new money for

rehabilitation, and it's unlikely to. Most of San Quentin's long-term prisoners, even its 327 lifers, have good disciplinary records and thus may be more receptive to self-improvement. In her new position, however, she is also charged with the hardest cases, including those who have been sent to the state's most scandal-plagued, violent prisons like Pelican Bay. "Anyone who thinks teaching knitting to felons can change them is naïve," said Ken Maddox, a police officer and now a Republican state assemblyman. "These programs are folly. These people have told us that they can't live among us by virtue of their acts. Maybe the Lord comes down to speak to them on the road to Damascus. Short of that, nothing works."

Set on a promontory on the former Bay of Skulls, San Quentin is a prison from old movies, a haphazard sprawl of crumbling buildings, including one that looks like a castle, complete with battlements. Behind six fortified gates, in this, the ultimate gated community, Woodford regularly sought out inmates. She cheered them at baseball games -- the San Quentin Giants play teams from throughout the Bay Area -- and stood by them when they received their G.E.D.'s or associate's degrees in the college program, one of a few remaining in any prison in the United States. During numerous visits to San Quentin, I heard many inmates tell stories about Woodford. One man -- tattooed on both arms and on his neck -- spoke on the condition of anonymity because he didn't want to be seen as "some warden lover." At first, he said he was suspicious when Woodford sought him out in the yard after his wife died in a car accident last year. "She told me how sorry she was, and asked, 'Is there anything I can do?' and her sincerity, I don't know, but I broke down," he said. "The warden sat with me for a long, long time after that. Sometimes we talked, sometimes we just sat there. I wasn't a con, a felon, a no-good. We were just two people."

Woodford grew up in rural Sonoma County, where her father was a rancher and her mother was a teacher. At Tomales High School she was a cheerleader and a member of Future Farmers of America. She enrolled in Sonoma State University, majoring in criminal justice. After graduation, Woodford wanted to work with juvenile offenders, but few jobs were available. San Quentin, at the time an all maximum-security institution, was recruiting, and in 1978, she was hired, becoming one of the prison's first female corrections officers to work in a cellblock.

With only cursory training with a baton and handgun, she was one of two officers assigned to cellblocks with as many as 500 felons. Violence -- inmate on inmate, guard on inmate -- was rampant. She drew on her upbringing and instinct, combining courtesy and firmness. "I treated them all the only way I knew how, respectfully," Woodford said. She learned inmates' names, offered them advice and addressed their "reasonable" grievances. Woodford has faith in the power of these cordial, often intimate relationships with prisoners, which she illustrated one day by telling the story of how, in those early days, she stopped an inmate from attacking another officer. She drew her gun but didn't fire, calling out to the attacker, whom she knew. "When he looked up at me, he almost seemed embarrassed by what he was doing," she said. It didn't seem that her war story was intended to show bravado, but to prove her guiding tenet that other than the truly incorrigible -- the sociopath or psychotic -- if you treat people as human beings, they respond accordingly. What she tellingly elided from the moral of the story was the message of her drawn pistol.

When she began work as a counselor in 1981, Woodford got to know inmates on a more personal level. "You spend time with the men, read their files," she said. "You watched your cases go out and come back, go out and come back, go out and come back. You felt for the children, and, yes, the men themselves. You wanted to do something different."

She got her chance in 1999, when she was appointed acting warden and then, the following year, warden. She reinstated an inmate-run advisory council and expanded the college. She started experimental programs to reduce recidivism. One, Success Dorm, includes up to 200 inmates who attend three

self-help groups a week and work on a community project inside the prison. The men chronicle their progress in journals and talk about it in discussion groups. It's a rigorous schedule that begins with a 4:30 a.m. wake-up call and continues until, on many nights, lights out at 10 p.m. A quarter of the prison's general population is in some kind of program -- more if you include sports -- but she wants all, excluding those on death row, to participate. Now, as the head of the Department of Corrections, she faces the daunting task of reaching more than 150,000 inmates. "We are obliged -- obliged -- to do everything we can so that when they are released, they don't come back," Woodford said.

Many of her fellow officers were supportive when she was made warden, but some resented having a woman for a boss, and others were appalled by her relationships with inmates. Even now, a guard, who spoke on the condition that I would not use his name, confided, "The hug-a-thug thing sickens me." In spite of the rancor of some officers, Woodford continued to spend time with inmates. Most, though not all, officers came around, partly because, as a former officer, she didn't shy away from cracking down. Rule violators were often sent to the so-called hole, and she locked down the cellblocks when there was violence or even a rumor of violence. "She is smart and manipulative, and I mean that in the best sense," said Lt. R.W. Egan, a longtime San Quentin guard, referring to her treatment of corrections officers. "She knows enough not to try to rule by force and fear, which wouldn't work here. A lack of enthusiasm of the part of C.O.'s would sabotage what she wants done. Instead, other than a few who will never change, she has made the officers feel as if we might be part of something important."

On an overcast day, with the bay a misty green soup, San Quentin was on what is called "fog line," when inmates are confined indoors because of the limited visibility. The incongruously named reception center, where inmates stay for a week or a few months while awaiting assignment to other prisons, was locked down because of a stabbing that occurred in the middle of the night. Woodford, who looked harried, cut our interview short because of a meeting with staff members who had been investigating the attack. Whereas violence was down in other parts of the prison under Woodford's watch, there were many stabbings and fights -- most race- or gang-related -- in the reception center.

Woodford may say she believes that all inmates should have access to programs, but she was pragmatic when it came to offering them. San Quentin's population has changed since she started as an officer. Most maximum-security inmates have been moved to new high-security prisons. The general population, about 1,800 men, is Level 2, which means that though they may be serving time for murder, they have records of good behavior in prison. There are 634 on death row, with an average of three more arriving each month. There are also as many as 3,600 men in the reception center. The revolving door of inmates there makes meaningful intervention difficult, she said, and many death-row inmates, though some take correspondence courses, are almost always confined to their cells. "They sit on the row and they go out to the exercise yard, and that's about it," she said. In fact, some death-row inmates are allowed to go outside as little as 10 hours a week to exercise in small kennel-like pens. Some are confined to small cages during family visits after a stabbing in the open visitation room. A criminal investigator for condemned prisoners said that Woodford, "though a hero in the rest of the prison, is loathed on death row because of her draconian crackdowns."

Presiding over executions was a responsibility she accepted with resignation and, possibly, abhorrence. By state law, the warden of San Quentin must conduct all executions -- of both men and women -- in California. She won't discuss her personal view of the death penalty, but her husband, Eric Woodford, a parole-agent supervisor in Oakland, said that executions "devastate her." She has carried out four. "No, it doesn't get easier over time," he said. "It gets harder." She told me, "I am not anyone's judge, and I am not a judge of the system, but I have a duty to perform."

There are those who see Woodford, who started her new job at the C.D.C. in late February (though she has yet to be confirmed by the State Senate), as too perfect – a Hollywood-worthy portrayal of the kindhearted warden turning crusading administrator. For others, the lines are clearly drawn between the keepers and the kept, and inmates' praise for the warden is just part of a bigger game. "Most of them say this warden is so great and kind, some angel," but they don't really mean it, a portly prisoner in an oversize sweatshirt told me on the condition I wouldn't use his name because he feared for his safety. "They say it to impress the parole board."

When the man left, however, a younger man, Stone Harrison, incarcerated since he was 17, approached me and, in a quiet voice, said: "I heard what that man just said to you, and I disagree. I been in pens for 16 years, and I have never had a warden come up to me to ask how I am getting along, and whether I had ideas about how I might want to better spend my time; never had a warden get involved in my story; never had one encourage me."

It is indeed tempting to dismiss such talk, because inmates have a strong motivation to curry favor with their warden. While they are inside, there is no escaping the fact that though she may be genuinely concerned about them, she is their keeper. She may be a kindly, matriarchal figure, but she holds the keys in the way, as an officer, she once held a pistol.

But even ex-cons and inmates who talked to me off the record spoke effusively of her. Most of the inmates I talked to, many of whom have been in other California prisons, said they were lucky to be at San Quentin, given the alternatives. Since they learned of her appointment, San Quentin inmates have been nervous, particularly since no replacement has been announced. Clearly, she left her mark on them. And if, when they are released, they are able to stay out of prison, it might just be because Woodford's nudging and encouragement (not to mention her programs) got through to them.

One of the many stories I heard about Woodford came from Harold Atkins, paroled from San Quentin in 1999. He was nearly transferred from the prison after serving three years of a six-year sentence, because, he said, he was in disfavor with an officer. Woodford was informed about the transfer and had Atkins escorted off the bus minutes before it left. "I was being shipped off to Corcoran," Atkins said. He had reason to fear the move to a prison that is reserved for the state's most violent felons. "Why would she bother? Blue suits" -- inmates in blue prison uniforms -- "are lined up, a hundred new ones coming in every day. One was already in my bunk." Allowed to finish out his term at San Quentin, he enrolled in Woodford's college and worked toward an Associate of Arts degree. He has since returned to his childhood neighborhood in East Palo Alto, where a gun battle first landed him in prison for attempted murder. "I owe her my new chance in the world," Atkins said. He now works on AIDS prevention and as a counselor of at-risk youth, skills he learned while at San Quentin.

David Sheff is the author of four books. He is working on a book about Lego. This is his first feature article for the magazine.

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CPR

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To: Judith Storandt, National Disabilities Rights Network

From: Robert D. Fleischner, Center for Public Representation
Nancy Alisberg, Connecticut Office of Protection and Advocacy

Re: Prison Abuse Remedies Act, H.R. 4109

Date: April 21, 2008

Nancy B. Alisberg is the managing attorney of the Connecticut Office of Protection and Advocacy for Persons with Disabilities. She is counsel in Office of Protection and Advocacy v. Choinski (D. Conn 2004). Robert Fleischner is an attorney at the Center for Public Representation, a legal back up center for protection and advocacy (P&A) agencies. He is counsel with the Massachusetts P&A in Disability Law Center v. Clarke (D. Mass. 2007) and with the Michigan P&A in Michigan Protection and Advocacy System v. Caruso (D. Mich. 2006). He also is currently working with P&As in New York, Texas, Alabama and elsewhere on behalf of youth in the juvenile justice systems in those states. Each has extensive experience with the Prison Litigation Reform Act (PLRA).

We write to comment on two provisions of the PLRA – the exhaustion requirement and the law's application to juveniles – that have had a particular impact on our clients. These problems would be remedied by Prison Abuse Remedies Act, H.R. 4109 (PARA).

1. Section 4 of the PARA would exempt juveniles from the provisions of the PLRA. The problems the PLRA was designed to resolve were not caused by juvenile prisoners in adult jails or by youth in juvenile detention centers or long term facilities. We have found that juveniles are particularly vulnerable to abuse in prison. Young prisoners with disabilities (certainly a majority of the youth in prison) are often denied appropriate mental health services, subjected to discipline for behavior that is a consequence of their immaturity and their mental disabilities, and are not provided the special education services to which they are entitled. They are usually unable to follow or even understand the complicated processes that can help them redress violations of their rights.

Likewise, youth with disabilities in juvenile justice facilities are often denied basic constitutionally mandated services, treatment, and education. Because of their disabilities, they are often unable to maneuver the administrative processes to complain about the conditions of their confinement. Conditions in many juvenile facilities do not meet constitutional minima. Although some states and counties are working to remedy those conditions, elsewhere litigation has been necessary and helpful where it has been pursued. Nevertheless, the PLRA makes such cases very difficult. The usual rules governing litigation are more than adequate to guard against the very few, if any, frivolous and malicious cases that might be brought by or on behalf of detained and institutionalized youth.

2. Section 3 of the PARA would modify the PLRA's "exhaustion" requirement. Under the PLRA, failure to exhaust all available administrative remedies in full compliance with the facility's rules, results in the dismissal of the lawsuit. We have

found, particularly for prisoners and youth with disabilities (and without timely legal representation, which is generally unavailable), proper exhaustion is almost impossible. The grievance systems in states we have worked often have unclear rules, very short time lines, and complicated procedures. In one state, for example, the process for filing complaints about medical care is separate from the system for other conditions complaints. We have seldom met with a prisoner with a disability who can explain the grievance system to us. We have also witnessed that prisoners, particularly youthful prisoners and juveniles, fear retaliation from prison staff or other prisoners if they file a grievance. In some facilities, at least, this fear is not unwarranted.

Our clients with mental illness or mental retardation in prisons and juvenile facilities have an especially difficult time negotiating the system. Their mental or cognitive impairments interfere with their abilities to understand and use the administrative processes.

While Section 3 of PARA would preserve the PLRA's goal of promoting administrative resolution of disputes, it would simplify the exhaustion requirements for prisoners. We believe that more of our clients with disabilities could comply with the revised process.

We hope this information is useful to NDRN.



Statement of David Fathi
United States Program Director, Human Rights Watch

Hearing on H.R. 4109, the "Prison Abuse Remedies Act of 2007"
US House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security
April 22, 2008

Human Rights Watch is grateful for the opportunity to submit a statement in support of H.R. 4109, the Prison Abuse Remedies Act of 2007, which would amend various provisions of the Prison Litigation Reform Act (PLRA).

In November 2007, this Subcommittee held an oversight hearing on the PLRA. At that time, Human Rights Watch presented testimony setting forth our grave concerns about several provisions of that statute. That testimony was made a part of the record and is available at http://hrw.org/english/docs/2007/11/07/usdom17277.htm. Today, we write to supplement that testimony by focusing on one provision of the PLRA, 42 U.S.C. § 1997e(e), and its inconsistency with treaty obligations undertaken by the United States. By amending the PLRA to repeal this provision, H.R. 4109 would bring the United States closer to compliance with its treaty obligations. Accordingly, Human Rights Watch respectfully urges the Subcommittee to support and pass H.R. 4109, the Prison Abuse Remedies Act of 2007.

Introduction

Under the Constitution, treaties signed and ratified by the United States "shall be the supreme Law of the Land." US Const., Art. VI, cl. 2. The United States has signed and ratified a number of human rights treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The Prison Litigation Reform Act provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). As demonstrated below, this provision – known as the "physical injury requirement" – is inconsistent with US obligations under these human rights treaties.

The PLRA's physical injury requirement is inconsistent with US obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The United States ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1994. This treaty defines "torture" as

> any act by which severe pain or suffering, *whether physical or mental*, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

CAT, Art. 1, sec. 1 (emphasis added). Thus, the intentional infliction of severe mental pain or suffering by prison officials can constitute torture prohibited by the treaty. This definition is consistent with domestic law; indeed the US Supreme Court has characterized "solitary confinement" as one of the techniques of "physical and mental torture" that have been used by governments to coerce confessions. *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940).

The treaty also requires that those who have been subjected to torture have a right to compensation; "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." CAT, Art. 14, sec. 1.

The Committee against Torture, the body of independent experts that monitors states parties' compliance with the CAT, most recently reviewed US compliance with the Convention in 2006. In its Conclusions and Recommendations, the Committee explicitly recognized that the PLRA's physical injury requirement contravenes Article 14 of the treaty, and called for its repeal:

> The Committee is concerned by section 1997e(e) of the 1995 Prison Litigation Reform Act which provides "that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury." (article 14).
>
> **The State party should not limit the right of victims to bring civil actions and amend the Prison Litigation Reform Act accordingly.**

Conclusions and Recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, 25 July 2006, ¶ 29 (emphasis in original). Enactment of H.R.

4109 would be in comformity with this recommendation of the Committee against Torture, and bring the United States closer to compliance with its treaty obligations under CAT.

The PLRA's physical injury requirement is inconsistent with US obligations under the International Covenant on Civil and Political Rights

The United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992. The ICCPR specifically addresses the rights of prisoners:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> * * *
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

ICCPR, Art. 10. The ICCPR also provides that a person whose rights guaranteed by the treaty have been violated must have access to an "effective remedy" for that violation:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

ICCPR, Art. 2, sec. 3.

The Human Rights Committee, the expert body that monitors compliance with the ICCPR, last reviewed US compliance in 2006. The Committee expressed concern that conditions in some high-security US prisons – particularly the regimes of isolated confinement common to such prisons – may violate Art. 10:

> 32. The Committee reiterates its concern that conditions in some maximum security prisons are incompatible with the obligation contained in article 10 (1) of the Covenant to treat detainees with humanity and respect for the inherent dignity of the human person. It is particularly concerned by the

> practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment. It is also concerned that such treatment cannot be reconciled with the requirement in article 10 (3) that the penitentiary system shall comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners.
>
> * * *
>
> **The State party should scrutinize conditions of detention in prisons, in particular in maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners.**

Concluding Observations of the Human Rights Committee, United States of America, CCPR/C/USA/CO/3/Rev. 1, 18 December 2006, ¶ 32 (emphasis in original).

The PLRA's physical injury requirement bars a remedy for prisoners wrongfully subjected to isolated confinement, in violation of Art. 2, sec. 3 of the ICCPR. For example, in *Pearson v. Welborn*, 471 F.3d 732, 744-45 (7th Cir. 2006), a jury concluded that the prisoner had been wrongfully held in a "supermax" prison, in conditions of extreme isolation, for more than a year in retaliation for his complaints about prison conditions. Nevertheless, the Seventh Circuit held that under the PLRA's physical injury requirement, he could not recover any compensation. *See also Royal v. Kautzky*, 375 F.3d 720, 723-24 (8th Cir. 2004) (physical injury requirement barred compensation for prisoner wrongfully placed in segregation).

The PLRA's physical injury requirement is inconsistent with US obligations under the International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was ratified by the United States in 1994. This treaty requires the United States to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms" and to "ensure that all public authorities and public institutions, national and local," refrain from engaging in racial discrimination. ICERD, Art. 2, sec. 1(a).

The treaty also requires that persons who have suffered racial discrimination have the right to seek judicial remedies, including compensation:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well

> as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

ICERD, Art. 6.

By denying compensation to a prisoner unless he or she has suffered a physical injury, the PLRA is inconsistent with US treaty obligations under ICERD. At least one federal court has held that the physical injury requirement bars compensation for prisoners who allege that they have been subjected to racial discrimination by prison officials. *See Jones v. Pancake*, 2007 WL 2407271 (W.D. Ky., August 20, 2007), at *3.

In sum, the PLRA's physical injury requirement cannot be reconciled with treaty obligations the United States has voluntarily undertaken by ratifying CAT, ICCPR and ICERD. By repealing the physical injury requirement, H.R. 4109 would bring the United States closer to compliance with its obligations under these treaties. Accordingly, Human Rights Watch respectfully urges the Subcommittee to support and pass H.R. 4109.

DEVELOPMENTS IN THE LAW

THE LAW OF MENTAL ILLNESS

"[D]oing time in prison is particularly difficult for prisoners with mental illness that impairs their thinking, emotional responses, and ability to cope. They have unique needs for special programs, facilities, and extensive and varied health services. Compared to other prisoners, moreover, prisoners with mental illness also are more likely to be exploited and victimized by other inmates."

HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 2 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf.

"[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society"

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101 (2000)).

"We as a Nation have long neglected the mentally ill"

Remarks [of President John F. Kennedy] on Proposed Measures To Combat Mental Illness and Mental Retardation, PUB. PAPERS 137, 138 (Feb. 5, 1963).

"[H]umans are composed of more than flesh and bone [M]ental health, just as much as physical health, is a mainstay of life."

Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995).

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I. INTRODUCTION

Three traditions have dominated mental health law scholarship: "doctrinal constitutional scholarship focusing on rights, therapeutic jurisprudence scholarship focusing on the therapeutic implications of different laws, and theoretical scholarship focusing on philosophical issues underpinning mental health law."[1] These strands are well represented in the six Parts of this Development, which focus on the interaction between mental illness and the law in its many forms. The separate Parts address the doctrines created by the Supreme Court and implemented by lower courts, federal and state legislation that enables or hinders the participation of the mentally ill in society, new institutional forms and their effects on the mentally ill, and underlying conceptual constructs about the nature of criminal punishment, competency, and active participation in society.

However, this Development does not take for granted the constructions of mental illness present in legal scholarship. The Parts delve into and recognize the law's impact on and therapeutic potential for the mentally ill, a nontrivial portion of the general population. An estimated 26.2% of Americans aged eighteen years and older suffer from a diagnosable mental disorder in a given year.[2] Because the criminal justice system has become home to many mentally ill individuals,[3] several of the Parts focus on this area. This Development notes that society has often failed to craft and interpret the law in ways that are cognizant of mental illness and sympathetic to mentally ill individuals. One might assume that the situation of the mentally ill in the legal system is continually improving as advocates demand more rights, but some Parts note that such a meliorative trend has not been present in recent years, especially in the criminal justice setting. However, the various Parts also note bright spots or opportunities ripe for legal solutions.

Part II discusses how lower courts have interpreted the Supreme Court's decision in *Sell v. United States*,[4] a case that discussed the standard for involuntarily medicating defendants in order to render them competent to stand trial. This Part finds that lower courts have on the whole misapplied *Sell*, leading to decreased protections for

[1] Elyn R. Saks, *Mental Health Law: Three Scholarly Traditions*, 74 S. CAL. L. REV. 295, 296 (2000).

[2] Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month* DSM-IV *Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCHIATRY 617, 617 (2005).

[3] *See* Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. TIMES, Mar. 5, 1998, at A1.

[4] 539 U.S. 166 (2003).

mentally ill defendants. *Sell* set out four factors that must be met before a trial court can balance the state's interest in prosecution with the defendant's liberty interests against forced medication. Using the narratives of the defendants in two cases, Susan Lindauer in *United States v. Lindauer*[5] and Steven Paul Bradley in *United States v. Bradley*,[6] the Part focuses on the first and fourth factors of the *Sell* test. Lower federal courts have evaluated the first factor, which asks whether the government has an important interest in bringing the defendant to trial, by using the potential maximum sentence for the crime. This Part argues that such an approach is flawed, and courts should instead use the approach of *Lindauer* (set forth in an opinion written by then-Judge Michael Mukasey), which considers the totality of the circumstances in assessing the severity of an offense and whether an important government interest exists. The Part further argues that the fourth factor, whether the medication is appropriate or in the best interests of the patient given her medical condition, should be directly addressed by courts and given independent meaning, even if this inquiry requires grappling with difficult medical and legal issues.

Part III explores how *United States v. Booker*,[7] which invalidated the provisions of the Sentencing Reform Act of 1984[8] that made the Federal Sentencing Guidelines mandatory,[9] increased judicial discretion to the potential detriment of mentally ill defendants. The U.S. Sentencing Guidelines Manual deals with mental illness in only a limited way, noting that such conditions are not normally relevant to sentencing[10] and allowing departures only to a very limited extent.[11] This Part discusses two pre-*Booker* cases, *United States v. Hines*[12] and *United States v. Moses*,[13] to illustrate how the Ninth and Sixth Circuits took divergent approaches to mental illness during this period. After *Booker*, judges have the discretion to refer to the sentencing factors articulated in 18 U.S.C. § 3553(a)[14] to impose sentences outside the Guidelines framework. This Part contends that as applied to violent

[5] 448 F. Supp. 2d 558 (S.D.N.Y. 2006).

[6] 417 F.3d 1107 (10th Cir. 2005).

[7] 543 U.S. 220 (2005).

[8] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[9] *Booker*, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part).

[10] U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (2007).

[11] *See id.* § 5K2.0.

[12] 26 F.3d 1469 (9th Cir. 1994).

[13] 106 F.3d 1273 (6th Cir. 1997).

[14] These factors include the "nature and circumstances of the offense," "the history and characteristics of the defendant," and the "need for the sentence imposed" to do such things as "reflect the seriousness of the offense," "afford adequate deterrence," "protect the public from further crimes of the defendant," and provide the defendant "medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a) (2000 & Supp. IV 2004).

mentally ill offenders, such variances are likely to be upward ones. Noting that early sentencing decisions indicate that judges are using their discretion in this troubling way,[15] the Part puts this topic in the larger context of the purposes of criminal punishment of the mentally ill and ultimately favors a policy of post-prison civil commitment over above-Guidelines prison sentences.

The problems of the mentally ill do not end when they enter prison. Part IV examines the impact of the Prison Litigation Reform Act of 1995[16] (PLRA) on mentally ill inmates and offers interpretations of key provisions that would help lessen the law's negative effects on this vulnerable population. The PLRA's exhaustion requirement[17] places a special burden on mentally ill inmates, who may for various reasons relating to their illness be incapable of meeting the Act's stringent requirements. This Part argues for a contextual definition of availability of grievance procedures that recognizes individual capability and is sensitive to the needs of mentally ill inmates. The PLRA's "physical injury" requirement[18] similarly impairs suits by mentally ill inmates. The Part suggests that the provision should be read not to bar constitutional claims, including violations of the Eighth Amendment right to correctional mental health care. The Part concludes by documenting some of the systemic effects of the PLRA, such as the underelaboration of judicial standards caused by the reduced quantity of judicial decisions addressing PLRA provisions.

Part V looks at the Court's procedural, as opposed to substantive, focus in three areas of criminal law: mens rea, the insanity defense, and competency. It argues that in two recent cases, *Clark v. Arizona*[19] and *Panetti v. Quarterman*,[20] the Court avoided creating substantive standards to govern these important areas, instead opting for procedural regulation. This Part claims, however, that creating procedural standards without some underlying substantive norm is meaningless and gives states the incentive to provide minimal substantive protections while ensuring that procedural safeguards are in place. Although substantive lawmaking is difficult, the Court should not shy away from it, and instead should create a substantive floor for the constitutional rights of the mentally ill. The Part claims that such substantive regulation could be justified under the Eighth Amendment or the Due Process Clause of the Fifth and Fourteenth Amendments.

[15] *See, e.g.*, United States v. Gillmore, 497 F.3d 853 (8th Cir. 2007).

[16] Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

[17] *See* 42 U.S.C. § 1997e(a) (2000).

[18] *Id.* § 1997e(e).

[19] 126 S. Ct. 2709 (2006).

[20] 127 S. Ct. 2842 (2007).

Despite the problems discussed above, Parts VI and VII offer some hope that the rights of the mentally ill may expand through awareness and advocacy. Both Parts indicate trends that, on the whole, are likely to benefit the mentally ill — by offering mentally ill offenders treatment instead of punishment, and by protecting mentally ill individuals' voting rights.

Part VI discusses the rise of mental health courts, which focus on rehabilitation and treatment of mentally ill offenders, and considers whether this phenomenon might indicate a shift toward a more rehabilitative view of punishment in the larger criminal justice system. This Part begins by outlining the general parameters of mental health courts and discussing their considerable growth in recent years. Although the start-up costs of forming these courts may be high, these courts could offer considerable cost savings in the long run by reducing recidivism rates. Recognizing the success and potential of these courts, the federal government has increasingly provided funding.[21] Federal funding for starting mental health courts, this Part argues, may indicate the country's increased willingness to move from a punitive model of justice to a rehabilitative model. In support of this trend, the Part cites a 2003 speech by Justice Kennedy to the American Bar Association (ABA),[22] a subsequent ABA report urging greater emphasis on rehabilitation,[23] and an ABA commission developed to follow up on that report. Mental health courts are a subset of this larger trend, but some practitioners and commentators have questioned both the rehabilitative focus and the perceived decrease in procedural protections available in these courts. Despite continuing controversy, the Part concludes that the trend toward use of specialized, rehabilitative courts is increasing and is generally beneficial.

Part VII considers the disenfranchisement of the mentally ill by exploring recent legislative and case-based developments in state and federal law that indicate increased sensitivity to mentally ill individuals' right to vote. In the past, most states simply disenfranchised those under guardianship for mental illness without considering whether the illness actually affected the capacity to vote. This Part argues that, because equal access to voting is a fundamental right, procedures for disenfranchising the mentally ill should be narrowly tailored to serve a compelling state interest. In response to advocacy for reform, states have begun to tailor their laws more narrowly to the real capacities of their mentally ill citizens, both by creating forms of limited guardian-

[21] *See* President's New Freedom Commission on Mental Health, Exec. Order No. 13,263, 3 C.F.R. 233 (2003) (superseded 2003).

[22] JUSTICE KENNEDY COMM'N, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 3–6 (2004), *available at* http://www.abanet.org/media/kencomm/rep112a.pdf.

[23] *Id.* at 24, 32–33.

ship and by changing outdated state laws and constitutional provisions. Beyond these legislative and constitutional reforms, advocates are turning to the courts as a means of changing the law. A victory in a Maine federal district court[24] by three disenfranchised women under guardianship identified some of the basic reasons that states should look to an individual's capacity to vote before disenfranchising that individual. In addition, a recent Supreme Court case, *Tennessee v. Lane*,[25] has great promise for advocates, opening the door to suits against the states for money damages resulting from the discriminatory removal of voting rights. This Part concludes by identifying possible ways to challenge remaining outdated disenfranchisement provisions and noting that the mentally ill could draw on lessons from and victories by the physically disabled.

II. *SELL V. UNITED STATES*: FORCIBLY MEDICATING THE MENTALLY ILL TO STAND TRIAL

For more than half a century, the Supreme Court has struggled to articulate the circumstances under which a court may force an individual to submit to medical procedures against his or her will.[1] In 2003, the Court concluded in *Sell v. United States*[2] that a nondangerous defendant could be forcibly medicated solely to achieve competence to stand trial, provided certain conditions, set out in a four-factor test, were met.[3] The Court offered little guidance on how to interpret these factors, and unsurprisingly, lower courts' methods of applying the *Sell* factors have varied significantly. This Part examines how lower courts have applied the *Sell* factors and argues that these courts have misinterpreted *Sell*. In order to avoid difficult questions at the intersection of medical and legal ethics, the lower courts have adopted weaker protections for the liberty interests of mentally ill defendants than what *Sell* requires.

Section A describes the decision in *Sell* and then discusses how the lower courts have applied each of the *Sell* factors. Section B focuses on the first factor, the so-called "importance" determination, and argues that courts have inconsistently and often incorrectly defined what constitutes an important state interest. Section C examines the fourth factor, whether forcible medication is medically appropriate, and argues that courts often conflate this determination with the earlier determination, under the second and third factors, of whether treatment

[24] Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001).

[25] 541 U.S. 509 (2004).

[1] *See, e.g.*, Rochin v. California, 342 U.S. 165, 173 (1952) (holding unconstitutional the pumping of a suspect's stomach against his will to obtain evidence).

[2] 539 U.S. 166 (2003).

[3] *See id.* at 180–81.

will be necessary and effective. Section D briefly discusses the second and third *Sell* prongs, which hinge most directly on the facts of individual cases.

A. The Sell *Decision*

In the early 1990s, the Supreme Court concluded that criminal defendants and convicted inmates could be medicated against their will,[4] but only if leaving them unmedicated posed a danger to themselves or others.[5] Those cases left unresolved the question of whether a nondangerous defendant could be forcibly medicated for the sole purpose of making him or her competent to stand trial.

In *Sell*, Justice Breyer, writing for the Court, explained that medication may be forced only "in limited circumstances, *i.e.*, upon satisfaction of conditions that we shall describe."[6] The trial court first ought to consider whether there are other grounds, such as a defendant's dangerousness to himself or others, upon which to order his forcible medication.[7] If the only reason the government seeks to medicate the defendant is to make him competent to stand trial, then the court must consider four factors. First, "a court must find that *important* governmental interests are at stake" in bringing the defendant to trial.[8]

[4] Those cases in which a mentally ill defendant might be medicated against his will to achieve competence typically involve one of three types of psychological conditions: (1) schizophrenia, schizoaffective disorder, and other psychotic disorders; (2) bipolar and other mood disorders; and (3) melancholic depression. (Dementia is another principal psychological disorder that would render a defendant incompetent to stand trial, but because it cannot be reversed medically or otherwise, it is irrelevant to the present discussion.) Telephone Interview with Dr. Khalid Khan, Mount Sinai Sch. of Med., New York, N.Y. (Oct. 17, 2007). The characteristic symptoms of schizophrenia are "delusions," "hallucinations," "disorganized speech," "grossly disorganized or catatonic behavior," and "restrictions in the range and intensity of emotional expression . . . , in the fluency and productivity of thought and speech . . . , and in the initiation of goal-directed behavior." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299 (4th ed., text rev. 2000). Psychiatrists estimate that 0.5% to 1.5% of the world population is schizophrenic. *Id.* at 308. Bipolar disorder is characterized by manic episodes and, sometimes, major depressive episodes. *Id.* at 382. Manic episodes are "period[s] of abnormally and persistently elevated . . . mood" that last at least one week and are severe enough to cause a "marked impairment" in occupational or social activities, involve psychotic features, or otherwise require hospitalization to prevent harm. *Id.* at 362. Many of the same medications can be prescribed for schizophrenic and bipolar patients, including Risperdal, Abilify, and Zyprexa. Researchers have not determined how these drugs work, although they believe that schizophrenia and bipolar disorder are caused by imbalances of neurotransmitters in the brain. Researchers believe these drugs regulate levels of dopamine and other neurotransmitters. *See* PHYSICIANS' DESK REFERENCE 882, 1676, 1830 (61st ed. 2007).

[5] *See* Riggins v. Nevada, 504 U.S. 127, 135 (1992); Washington v. Harper, 494 U.S. 210, 236 (1990).

[6] *Sell*, 539 U.S. at 169.

[7] *Id.* at 182; *see, e.g.*, United States v. Kourey, 276 F. Supp. 2d 580, 580–81 (S.D. W. Va. 2003) (holding forced medication to be inappropriate under *Sell*, but potentially appropriate on *Harper* grounds because the defendant was dangerous).

[8] *Sell*, 539 U.S. at 180.

Trial on a "serious" charge is an important government interest, but the government's interest may be lessened by "[s]pecial circumstances," such as if the defendant will likely be civilly committed if he is not tried or if he has already been confined for a significant amount of time.[9] Second, the trial court must conclude that the medication will be effective — that it will "*significantly further*" the goal of making the defendant competent to stand trial and that the medication's side effects are not likely to interfere with the defendant's ability to assist counsel.[10] Third, the trial court must find that no less invasive treatment is likely to produce the same result — that the medication is "*necessary*."[11] Finally, the court must determine that the medication is "*medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition."[12]

The Court implied that after a trial court evaluates these factors, it must then weigh these interests against the defendant's liberty interests in remaining free from unwanted medical treatment.[13] Still, the Court was somewhat ambiguous about what, if anything, a trial court must do, beyond determining whether the four factors have been met. The Court did not help matters by describing the test as a "standard"[14] while also setting a somewhat mechanical process by which courts should evaluate defendants. The proper reading of *Sell* embraces both approaches. A trial court must first ensure that each of the four factors is satisfied, and it then must weigh those factors against the defendant's Fifth Amendment liberty interest to be free from unwanted medical treatment.[15] But once the trial court has concluded that the four factors are satisfied, there is likely to be little balancing left to do. This is because there are few, if any, defendants who would be incompetent to stand trial but competent to make medical decisions. That is, the courts applying *Sell* are looking at a population that is very likely incompetent to make medical decisions and that, even if not in the criminal justice system, would have medical decisions made by a guardian or a court. Therefore, because the defendant would not otherwise be free from unwanted treatments that a third party found

[9] *Id.*

[10] *Id.* at 181.

[11] *Id.*

[12] *Id.*

[13] *See id.* at 183 ("Has the Government, in light of the [second through fourth factors], shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?").

[14] *Id.* at 180.

[15] *See id.* at 177; United States v. Schloming, Mag. No. 05-5017 (TJB), 2006 WL 1320078, at *4 (D.N.J. May 12, 2006) ("The *Sell* criteria, taken as a whole, must outweigh a Defendant's significant interest in avoiding the unwanted administration of antipsychotic drugs. . . . Each of the *Sell* criteria must be met in order to show that the Government's interests are overriding.").

medically appropriate, he or she would not have a meaningful liberty interest in this context either.[16]

B. An "Important" Government Interest

As early as age seven, Susan Lindauer claimed to have the gift of prophecy.[17] Through adulthood, she continued to believe she was the instrument of divine intervention, "suggest[ing] that she reported 11 bombings before they occurred, . . . plac[ing] herself at the center of events in the Middle East, and declar[ing] herself to be an angel."[18] A federal district judge summed up Ms. Lindauer's situation: "[E]ven lay people can perceive that Lindauer is not mentally stable."[19] In March 2004, FBI agents arrested Lindauer at her Maryland home.[20] A federal indictment charged her with four felonies: conspiracy to act as an unregistered agent of the government of Iraq, acting as an unregistered agent of Iraq, accepting payments from the Iraq Intelligence Service, and engaging in financial transactions with the government of Iraq.[21] The indictment alleged that Lindauer met with Iraqi officials in New York and Baghdad between 1999 and 2002, and that she delivered a letter on behalf of the Iraqis to the home of an unspecified government official, possibly Andrew Card, the then–White House chief of staff and a distant cousin of hers.[22] Government and defense mental health experts agreed that Lindauer was incompetent to stand trial.[23] On September 6, 2006, Judge Michael Mukasey[24] decided that *Sell* did not permit him to order Lindauer medicated against her will.[25] Two days later, Judge Mukasey ordered Lindauer released.[26]

Judge Mukasey's opinion, although atypical in its approach, provided a template for courts weighing the first *Sell* factor: the importance of the government interest in bringing the defendant to trial. Judge Mukasey began his analysis of the *Sell* factors with a remarka-

[16] *See* Robert F. Schopp, *Involuntary Treatment and Competence To Proceed in the Criminal Process: Capital and Noncapital Cases*, 24 BEHAV. SCI. & L. 495, 503–08 (2006); *see also* CHRISTOPHER SLOBOGIN, MINDING JUSTICE 227–30 (2006).

[17] United States v. Lindauer, 448 F. Supp. 2d 558, 562 (S.D.N.Y. 2006).

[18] *Id.*

[19] *Id.* at 564.

[20] David Samuels, *Susan Lindauer's Mission to Baghdad*, N.Y. TIMES, Aug. 29, 2004, § 6 (Magazine), at 25.

[21] *Lindauer*, 448 F. Supp. 2d at 560.

[22] *Id.*

[23] *Id.* at 559.

[24] *Lindauer* was the last opinion Judge Mukasey published before retiring from the bench. On November 9, 2007, Mukasey was sworn in as the country's eighty-first Attorney General. *See Mukasey Takes Oath of Office*, N.Y. TIMES, Nov. 10, 2007, at A9.

[25] *Lindauer*, 448 F. Supp. 2d at 559.

[26] Anemona Hartocollis, *Ex–Congressional Aide Accused in Iraq Spy Case Is Released*, N.Y. TIMES, Sept. 9, 2006, at B1.

bly humanistic assessment of the *Sell* regime, quoting Justice Frankfurter's iconic decision in *Rochin v. California*[27]:

> Although the Court's discussion of a defendant's interest in avoiding forced psychotropic medication seems at times curiously anodyne, I think it is not inappropriate to recall in plain terms what the government seeks to do here, which necessarily involves physically restraining defendant so that she can be injected with mind-altering drugs. There was a time when what might be viewed as an even lesser invasion of a defendant's person — pumping his stomach to retrieve evidence — was said to "shock[] the conscience" and invite comparison with "the rack and the screw." The Supreme Court's rhetoric seems to have toned down mightily since then, but the jurisprudential principles remain the same.[28]

Judge Mukasey concluded that it was beyond dispute that no alternative to medication would render Lindauer competent (the third factor).[29] There was no evidence as to whether medication was particularly in Lindauer's interest (the fourth factor), but inquiry into this question was unnecessary because the judge also concluded that the government had failed to convince him by clear evidence that the government had an important interest in bringing Lindauer to trial (the first factor) or that the medicine would be effective in restoring Lindauer's competence (the second factor).[30]

The government argued that the court should conclude that it had a strong interest in bringing Lindauer to trial because of the ten-year maximum sentence Lindauer faced if convicted on even a single count.[31] Judge Mukasey disagreed.[32] In his view, "the high-water mark of defendant's efforts . . . was her delivery of a letter . . . to the home of an unspecified government official, in what is described even in the indictment as 'an unsuccessful effort to influence United States foreign policy.'"[33] "[T]here is no indication that Lindauer ever came close to influencing anyone, or could have."[34] He therefore concluded, even without evaluating whether the evidence was sufficient to secure a conviction, that the government did not have an important interest in bringing the defendant to trial.[35]

Despite the intuitive appeal of the *Lindauer* approach, it has not been adopted elsewhere. Indeed, it is at odds with what has become

[27] 342 U.S. 165 (1952).

[28] *Lindauer*, 448 F. Supp. 2d at 567 (alteration in original) (citation omitted) (quoting *Rochin*, 342 U.S. at 172).

[29] *Id.* at 571. The Second Circuit has ruled that the government must satisfy the *Sell* factors by clear and convincing evidence. *See* United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004).

[30] *Lindauer*, 448 F. Supp. 2d at 571–72.

[31] *Id.* at 571.

[32] *Id.*

[33] *Id.* at 560–61.

[34] *Id.* at 571–72.

[35] *Id.* at 572.

the dominant approach. Most courts have judged the importance of bringing a defendant to trial based on the maximum penalty the defendant could face if convicted. The Fourth Circuit noted that although the *Sell* Court did not indicate how lower courts were to judge the seriousness of crimes, the Supreme Court in other contexts had condoned evaluating the seriousness of a crime based on the potential penalty a defendant faced if convicted.[36] Courts following this approach have focused on the potential maximum sentence, not the much lower probable sentence under the Federal Sentencing Guidelines.[37] Other courts that do not perform a specific analysis of a defendant's potential sentence have evaluated the seriousness of a charge based on its legislative classification.[38]

While strict adherence to legislative determinations of crime severity via maximum sentences is appealing because it creates "sharp, easily administrable lines" for judges,[39] this approach could not have been what the *Sell* Court intended. "Had it been the Supreme Court's intention to classify a charge as serious based on the maximum penalty, it could have done so."[40] Instead, *Sell* leaves the term "serious crime" largely undefined.[41] The majority of courts, which base state interest decisions on the potential sentence, appear to respect legislative decisions about the seriousness of the crime. This approach is consistent with other criminal doctrines, such as that of the Sixth Amendment jury right, that determine the seriousness of a crime by its potential sentence.[42] However, the *Sell* test for seriousness would seem to be

[36] United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (citing Duncan v. Louisiana, 391 U.S. 145, 159 (1968)).

[37] *See, e.g.*, *id.* at 237–38 (concluding that courts ought to refer to the statutory maximum, not a probable guideline range, because given the lack of a presentencing report and other information not available until sentencing, a pretrial estimate of a probable sentence would be too speculative); *see also* United States v. Palmer, 507 F.3d 300, 304 (5th Cir. 2007) (following *Evans*); United States v. Archuleta, 218 F. App'x 754, 759 (10th Cir. 2007) (same). *But see* United States v. Hernandez-Vasquez, 506 F.3d 811, 821 (9th Cir. 2007) (advising district courts to consider, among other factors, the Guidelines range, not the statutory maximum, when determining crime seriousness); United States v. Thrasher, 503 F. Supp. 2d 1233, 1237 (W.D. Mo. 2007) ("[T]he 'expected sentence' can be more fairly appraised by estimating a Guideline sentence The court should place itself in the position of a prosecutor who is fair-minded and objective. That should allow evaluation of the 'governmental interest,' not some abstraction like the statutory maximum.").

[38] *See* United States v. Kourey, 276 F. Supp. 2d 580, 585 (S.D. W. Va. 2003) ("Defendant is not facing serious criminal charges Defendant is charged with violating the terms and conditions of his supervised release imposed for his admitted commission of a Class A misdemeanor.").

[39] Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1973 (2004).

[40] United States v. Schloming, Mag. No. 05-5017 (TJB), 2006 WL 1320078, at *5 (D.N.J. May 12, 2006).

[41] *See* Sell v. United States, 539 U.S. 166, 180 (2003).

[42] *See* Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968); *see also* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (imposing a higher standard for exigency on warrantless home arrests involving minor offenses); Duke v. United States, 301 U.S. 492, 494–95 (1937) (affirming the "well-settled

distinguishable from these other seriousness determinations because in other cases, the Court is concerned with whether the seriousness of the charge will entitle the defendant to certain rights, such as the right to a jury trial or indictment by a grand jury. Here, by contrast, the Court is determining whether the seriousness of the crime creates a sufficiently important state interest in bringing the defendant to trial that outweighs his or her independent right to be free from unwanted medical procedures. While the sentence length is a reasonable consideration for determining whether a defendant-protective right should apply, it is a less useful signal of whether there is a serious state interest in seeing a defendant brought to trial. Even when the defendant faces little or no jail time, the state may still have an important interest in bringing him to trial, for instance in symbolic prosecutions of high-profile defendants.[43]

Like the analogy to other situations in which courts evaluate the "seriousness" of crimes, the argument for honoring legislative intent does not quite fit the *Sell* setting either. Congress, after all, is not making individualized decisions about specific defendants, and certainly not about the specific question of whether the state has a strong interest in bringing the defendant to trial. Indeed, with the adoption of the Federal Sentencing Guidelines,[44] Congress seems to have urged the reverse: the seriousness of a crime, as judged by a sentence, cannot be determined by rote consultation of the maximum possible sentence, but can only be evaluated by looking to the circumstances of a particular offense and offender.[45] Given the broad determination that is being made here — whether or not a serious crime has been committed — reference to a potential Guidelines range is more effective, and fairer to the defendant, than reference to the statutory maximum.[46]

rule" that "any misdemeanor not involving infamous punishment might be prosecuted by information instead of by indictment").

[43] *See, e.g.*, Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL'Y 145, 168 (2002) (advocating selective prosecution of assaults committed in the course of professional sports).

[44] Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[45] The Sentencing Guidelines, of course, were adopted to restrain judges' sentencing discretion. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993). But as modified by *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines preserve a great deal of judicial discretion to tailor sentences to the severity of the crime, in light of all circumstances.

[46] In light of *Booker*, which rendered the Guidelines advisory, sentencing judges have more discretion to make individualized decisions. Still, the now nonbinding nature of the Guidelines does not mean they lose their value as indicia of crime seriousness. Indeed, the Guidelines will still be sufficiently predictive of actual sentences to make them a relevant indicator of crime seriousness. *See* Recent Case, 120 HARV. L. REV. 1723, 1730 (2007).

Sell asked the lower courts to consider the overall significance of the state interest in bringing a defendant to trial, taking into account both the seriousness of the crime and the consequences if the defendant is not brought to trial. The *Lindauer* approach is not popular among lower courts, but it appears to be the most faithful articulation of the *Sell* command. Judge Mukasey's suggestion that a *Rochin*-esque concern for defendants' Fifth Amendment liberty interests still applies must have informed his belief that judges are to make individualized determinations of the importance prong. Courts seeking to mirror Judge Mukasey's approach will need to consider the totality of the circumstances. Other judges might follow Judge Mukasey by looking at what harm the indictment alleges a defendant caused or could have caused. They might also consider the potential Guidelines sentencing range a defendant would face and the possible consequences of not bringing a defendant to trial. Courts should also consider other benefits of prosecution besides the potential incapacitation of the defendant, including the "retributive, deterrent, communicative, and investigative functions of the criminal justice system."[47] The process will not be mechanical or easy, but it will better fulfill the mandate of *Sell* than the current majority approach.[48]

C. "Medically Appropriate"

On January 30, 2003, Steven Paul Bradley, "dissatisfied with the purchase of a truck," drove by Cowboy Dodge in Cheyenne, Wyoming, and hurled a hand grenade at a group of salesmen in the parking lot.[49] "Attached to the grenade was a note [that] read[,] 'I want my $26,000.'"[50] Bradley was charged with attempted arson, possession of ammunition by a felon, extortion, and use of a firearm in a violent crime.[51] At a competency hearing, Bradley testified that he would not voluntarily take psychotropic medication that likely would have made

[47] United States v. Weston, 255 F.3d 873, 882 (D.C. Cir. 2001); *see also* Christopher Slobogin, *The Supreme Court's Recent Criminal Mental Health Cases: Rulings of Questionable Competence*, CRIM. JUST., Fall 2007, at 8, 10.

[48] The unavoidable consequence of the first *Sell* prong is that judges will be in the position of questioning prosecutorial decisions. The Court did not address the separation of powers implications of its holding, perhaps indicating it did not believe such review to be an incursion on Article II power. *Cf.* Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1070 (2003) (citing United States v. Miller, 891 F.2d 1265, 1272 (7th Cir. 1989) (Easterbrook, J., concurring)) (reporting Judge Easterbrook's identification of a "separation of powers concern that might arise equally in the context of judicial review of a prosecutor's exercise of his discretion to charge an offense"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1546 (1981) ("Courts often justify their refusal to review prosecutorial discretion on the ground that separation-of-powers concerns prohibit such review.").

[49] United States v. Bradley, 417 F.3d 1107, 1110 (10th Cir. 2005).

[50] *Id.*

[51] *See id.* at 100 & nn.2–5.

him competent to stand trial: "[N]ot only did they take my money, they never gave me a truck either, and that's what the whole issue is over this here, was going out to buy a new truck, and I don't see where medication is going to help me with that."[52] The district court found that Bradley was incompetent and that the *Sell* criteria were met.[53] The court ordered Bradley to submit to the medication, on pain of civil contempt.[54] The defendant appealed from this order and the Tenth Circuit affirmed.[55]

The Tenth Circuit, however, appeared to misread *Sell* by equating the medical appropriateness of forced medication with its potential effectiveness.[56] The Tenth Circuit's approach illustrates the key difficulties in applying this fourth *Sell* factor, the medical appropriateness of treatment. The court addressed this factor first, but clearly mischaracterized it by saying that "[t]his necessarily includes a determination that administration of the drug regimen is 'substantially likely to render the defendant competent to stand trial.'"[57] The court thereby conflated the second and fourth *Sell* factors. Then, seeming to remember that there were supposed to be four factors, the court said the next factor to examine was whether "administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense."[58] Thus, the court merely created two factors out of *Sell*'s second factor, which included both whether the medication will be directly effective at restoring competence and whether the side effects from the drug will undermine its effectiveness.[59] In allowing this single factor to take up two slots, the court crowded out the distinct medical appropriateness factor.[60]

[52] Brief of Appellee at 10, *Bradley*, 417 F.3d 1107 (No. 03-8097), 2004 WL 3763208.

[53] *Bradley*, 417 F.3d at 1109.

[54] Brief of Appellee, *supra* note 52, at 13. In *Bradley*, the district court was not precisely in a *Sell* situation because it was not ordering that the defendant be *forcibly* medicated, only that the defendant submit to medication on pain of civil contempt. The *Sell* Court had suggested that courts consider the threat of contempt as an example of alternative mechanisms for achieving competence short of forcible mediation. *See* Sell v. United States, 539 U.S. 166, 181 (2003). On appeal, the Tenth Circuit ignored this distinction, treating *Sell* as directly applicable, *Bradley*, 417 F.3d at 1109, and so the case serves as an adequate example of the alternative approaches to *Sell*.

[55] *Bradley*, 417 F.3d at 1109, 1113.

[56] *Cf.* United States v. Lindauer, 448 F. Supp. 2d 558, 565 (S.D.N.Y. 2006) ("[T]he second element focuses on favorable and unfavorable outcomes only insofar as they affect a trial, whereas the fourth element focuses on the defendant's medical well-being in the large.").

[57] *Bradley*, 417 F.3d at 1114 (quoting *Sell*, 539 U.S. at 181).

[58] *Id.* at 1115 (quoting *Sell*, 539 U.S. at 181) (internal quotation mark omitted).

[59] *Sell* is quite clear that determining whether medication will have adverse side effects that will prevent a defendant from assisting counsel is part of the inquiry into whether the medication will be effective at rendering the defendant competent. *See* 539 U.S. at 181.

[60] This approach is well established in the Tenth Circuit. *See, e.g.*, United States v. Valenzuela-Puentes, 479 F.3d 1220, 1225–26 (10th Cir. 2007); United States v. Smith, No. 05-

Other courts have not been as cavalier as the Tenth Circuit about disregarding the fourth element, but even when they have considered it, they have tended to equate the patient's medical interest with restoring competency.[61] But given that these are separate factors, *Sell*'s implication is that medical appropriateness is a separate question with which lower courts need to wrestle, independent of the other factors.[62] Courts have been loath to address it and are perhaps somewhat dishonestly avoiding the question.[63]

Even though courts have not spent much time considering this fourth factor, it is possible to give independent meaning to the medical appropriateness prong. An initial stumbling block is that doctors may conclude that any treatment that could result in a patient being prosecuted may not be medically appropriate — such treatment could conflict with doctors' Hippocratic oath to "do no harm."[64] A definition of medical appropriateness limited to the treatment being the "right treatment for the condition," assuming the defendant was not on trial,

40002-01-JAR, 2007 WL 1712812, at *4 (D. Kan. June 12, 2007) (medical interest determination "includes the determination of whether administering [psychotropic medication] is 'substantially likely to render the defendant competent to stand trial'" (quoting *Sell*, 539 U.S. at 181)).

[61] *See, e.g.*, United States v. Morris, No. CR.A.95-50-SLR, 2005 WL 348306, at *6 (D. Del. Feb. 8, 2005) ("This final prong of *Sell* has been adequately addressed in the analysis of the other three prongs."). *But see* United States v. Milliken, No. 3:05-CR-6-J-32TEM, 2006 WL 2945957, at *13–14 (M.D. Fla. July 12, 2006) (evaluating appropriateness of proposed medical treatment in light of defendant's condition, independent of its anticipated effectiveness in restoring competence).

[62] *Cf.* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2536 (2007) ("[W]e have cautioned against reading a text in a way that makes part of it redundant."). The reference in *Defenders of Wildlife* is to statutory construction, but seems equally true for the interpretation of Supreme Court holdings.

[63] Courts of appeals vary in their willingness to disregard the medical appropriateness factor. The Fourth Circuit requires the government to describe in detail the prescribed treatment and requires doctors to submit testimony that the treatment is appropriate for the particular defendant. *See* United States v. Evans, 404 F.3d 227, 241–42 (4th Cir. 2005). The Second Circuit has allowed relatively conclusory testimony — that given the defendant's diagnosis, "he needs . . . treatment [with] anti-psychotics" — to satisfy the medical appropriateness prong. *See* United States v. Gomes, 387 F.3d 157, 163 (2d Cir. 2004).

[64] Psychiatrist Douglas Mossman concludes that psychiatrists can make medical appropriateness determinations because psychotropic medication would restore patient autonomy, not undermine it, and alternatively, because "[a] defendant's consent to treatment is one aspect of his larger consent to freedom under law within the original [social] contract." Douglas Mossman, *Is Prosecution "Medically Appropriate"?*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15, 73, 77 (2005). *But cf.* Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569 (1992) (arguing that the courts are insufficiently deferential to autonomy concerns); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1774–77 (1992) (suggesting the courts have been too quick to find individuals incompetent). Some argue that prosecution can be medically indicated for some psychiatric patients. *See, e.g.*, Robert D. Miller, *Ethical Issues Involved in the Dual Role of Treater and Evaluator*, *in* ETHICAL PRACTICE IN PSYCHIATRY AND THE LAW 129, 139–40 (Richard Rosner & Robert Weinstock eds., 1990) (arguing that prosecution may under some circumstances have direct therapeutic benefits).

largely avoids these difficult questions.[65] Others have argued that the medical appropriateness prong requires more difficult weighing of the competing values of justice and patient autonomy,[66] but neglect the fact that these values are entirely accounted for in the other *Sell* factors, including the test for an important state interest and the required search for effective alternatives.

Sell defines medical appropriateness as being "in the patient's best medical interest in light of his medical condition."[67] The Court intended this definition to mean more than that the treatment will be effective in rendering a patient competent to stand trial. A suitable definition is that the proposed treatment is right for the defendant's condition, given his medical history.[68]

D. "Effective" and "Necessary"

Sell factor three — whether a less intrusive, yet effective alternative is available — and factor two — whether the treatment is likely to be effective — are determinations that are closely linked to the facts of an individual case. Because of recent developments in psychopharmacology, there is likely to be progressively less dispute on these elements of the *Sell* test.

For the incompetent defendant, medical treatment will often be more effective than any alternative.[69] Although some disorders are more amenable to alternative treatments such as psychotherapy, both government and defense medical experts frequently testify that no treatment but medication has been shown to be effective.[70] And although the conditions of *Bradley* show that courts do try to coerce defendants into "voluntarily" accepting a medication order, when such

[65] *See* Mossman, *supra* note 64, at 35–36 (describing this view).

[66] *See id.* at 36 & n.89.

[67] Sell v. United States, 539 U.S. 166, 181 (2003).

[68] For instance, some antipsychotics may be contraindicated for diabetics because of their effects on metabolics. *See, e.g.*, PHYSICIANS' DESK REFERENCE, *supra* note 4, at 1677 (noting that hyperglycemia is associated with Risperdal and other atypical antipsychotics).

[69] *See* Douglas Mossman, *Unbuckling the "Chemical Straitjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1048–49 (2002) (discussing improved effectiveness of medication for schizophrenia); *see also* Motion for Leave To File Brief and Brief for the American Psychiatric Ass'n et al. as Amici Curiae Supporting Respondent at 16–17, *Sell*, 539 U.S. 166 (No. 02-5664), 2003 WL 1766630 ("With the newer medications, it is all the more firmly true that medications are commonly essential to responsible treatment of psychoses like schizophrenia."). *But see* Motion for Leave To File Brief for Amicus Curiae American Psychological Ass'n and Brief for Amicus Curiae American Psychological Ass'n at 11, *Sell*, 539 U.S. 166 (No. 02-5664), 2002 WL 31898300 ("There is a significant danger . . . that health-care professionals in a forensic setting may proceed immediately to medication without considering less intrusive alternatives that might be effective in restoring competence.").

[70] *See, e.g.*, United States v. Morrison, 415 F.3d 1180, 1183 (10th Cir. 2005); United States v. Cortez-Perez, No. 06-CR-1290-WQH, 2007 WL 2695867, at *3 (S.D. Cal. Sept. 10, 2007).

measures fail (as they often do), forced medication becomes "necessary."[71]

The effectiveness prong includes consideration of both the expected direct effectiveness of a drug regime in restoring a defendant to competency and whether the expected side effects of the drug will outweigh its benefits in rendering the defendant competent.[72] Dramatic "extrapyramidal" side effects that plagued early psychotropic drugs have greatly diminished in the current generation of pharmaceuticals.[73] These extrapyramidal symptoms appear to be the ones courts are most worried about.[74] Nevertheless, modern drugs still have significant side effects,[75] and depending on the conditions of the case, these effects could meaningfully affect the defendant's ability to receive a fair trial.[76]

E. Conclusion

Lower courts have not consistently applied the *Sell* standards, perhaps because the case asked lower courts to judge defendants according to standards that are ill-suited for application as bright-line rules. In both the importance and medical appropriateness prongs, courts have diverged from the *Sell* mandate, reading something that was not

[71] Some believe that the *Sell* Court overstated the potential effect of the contempt power in persuading a mentally ill defendant to consent to medication. *See* Paul S. Appelbaum, *Treating Incompetent Defendants: The Supreme Court's Decision is a Tough* Sell, 54 PSYCHIATRIC SERVICES 1335, 1336 (2003). Given the range of potential defendants, it is hard to dismiss entirely the possibility that civil contempt could encourage a defendant to submit to medication.

[72] *See supra* p. 1129.

[73] The earliest generation of antipsychotic medicine was developed in the 1950s. The first antipsychotic was chlorpromazine, the generic name of Thorazine. These drugs had severe "extrapyramidal" side effects, which could include "stiffness, diminished facial expression, tremors, and restlessness." Because these effects were so unpleasant, patients would often stop taking the drugs. Mossman, *supra* note 69, at 1062–63 & n.147, 1068; *see also* United States v. Gomes, 387 F.3d 157, 162 n.* (2d Cir. 2004) ("'Typical' anti-psychotic drugs can potentially produce more severe side effects, such as neuroleptic malignant syndrome (temperature disorder and muscle breakdown) and tardive dyskinesia (involuntary movement of the face and tongue)."). In late 1989, the FDA approved clozapine, the first drug without these extrapyramidal symptoms. Clozapine and its class were dubbed "atypical" psychotropics. Mossman, *supra* note 69, at 1069–70.

[74] *See, e.g.*, United States v. Grape, 509 F. Supp. 2d 484, 489 (W.D. Pa. 2007) ("The second generation medications are much less likely than first generation medications to cause neuroleptic malignant syndrome, tardive dyskinesia, or extrapyramidal side effects such as stiffness, and feelings of anxiety or agitation."); *see also* SLOBOGIN, *supra* note 16, at 223 ("[T]he recent developments of 'atypical' antipsychotic medications, which are purportedly more effective and have significantly fewer side effects, could be changing the terms of the debate").

[75] *See* Alex Berenson, *Schizophrenia Medicine Shows Promise in Trial*, N.Y. TIMES, Sept. 3, 2007, at A9 (describing newest generation of pharmaceuticals, which may be free from even the lesser side effects, such as weight gain and tremors, that had accompanied atypicals).

[76] *See, e.g.*, United States v. Dallas, No. 8:06CR78, 2007 WL 2875170, at *8 (D. Neb. Sept. 27, 2007).

quite there into the case and overlooking what was — no doubt because *Sell* required judges to wrestle with difficult questions.

III. *BOOKER*, THE FEDERAL SENTENCING GUIDELINES, AND VIOLENT MENTALLY ILL OFFENDERS

The Supreme Court's decision in *United States v. Booker*[1] dealt a strong blow to a system of federal sentencing guidelines that many viewed as unfair[2] and unsuccessful.[3] *Booker* granted judges more discretion, but such discretion is not a wholly positive outcome. This Part argues that, by permitting judges greater reliance on 18 U.S.C. § 3553(a) (the statute that sets forth Congress's sentencing objectives), the federal sentencing regime initiated by *Booker* allows for prison sentences for violent mentally ill offenders longer than those suggested by the Federal Sentencing Guidelines. The claim is not that defendants have been given longer sentences purely on account of mental illness. Rather, this Part argues that judges have imposed prison sentences beyond what the Guidelines recommend on some mentally ill offenders they view as dangerous or in need of treatment instead of supplementing Guidelines sentences as necessary with civil commitment.[4] Such lengthy prison sentences disregard the rights and interests of the offenders and provide little benefit to the public. Although this is not an area with many reported cases,[5] the cases that have been reported

[1] 543 U.S. 220 (2005).

[2] *See, e.g.*, Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 102–06 (2005) (arguing that the Federal Sentencing Guidelines failed to end disparities in sentencing along racial, gender, and ethnic lines); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319–20 (2005) (describing the Guidelines as "a one-way upward ratchet increasingly divorced from considerations of sound public policy and . . . the commonsense judgments of frontline sentencing professionals").

[3] For instance, despite the goals of the Guidelines' framers, implementing the Guidelines did not remove discretion from the federal sentencing system. Instead, the combination of determinate sentences for offenses, overlapping sentences within the federal criminal code, and plea bargaining invested discretion in prosecutors rather than judges. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2550–62 (2004); Ronald F. Wright, *Trial Distortion and the End of Innocence*, 154 U. PA. L. REV. 79, 132 (2005).

[4] Civil commitment is an option provided by both state commitment statutes and 18 U.S.C. § 4246 (2000).

[5] The limited number of reported cases involving a sentence that departs upward from the sentence indicated by the Guidelines on the basis of an offender's mental illness may not accurately reflect the prevalence and effect of this sentencing practice. The vast majority of cases in the federal system end in pleas: in 2002, for instance, more than 95% of defendants in adjudicated cases pleaded either guilty or no contest. Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005) (book review); *see also* Blakely v. Washington, 542 U.S. 296, 337 (2004) (Breyer, J., dissenting) (noting that more than 90% of defendants reach plea agreements before trial). In cases involving violent crimes, a high sentence upheld on appeal creates a long shadow under which future parties in a plea "transaction" will bargain. *See* Stuntz, *supra* note 3, at 2563. In cases that do go to trial, sentencing judges are not

raise important questions about how society manages the often-difficult intersections between the rights of the mentally ill[6] and the safety needs and behavioral expectations of society at large.

Section A offers an introduction to the Guidelines and their approach to mental illness. Section B argues that *Booker*'s shift from mandatory to advisory guidelines has combined with certain dynamics of the criminal justice system and the language of 18 U.S.C. § 3553(a) to create an additional opportunity for judges to impose above-Guidelines prison sentences on violent mentally ill offenders. Section C discusses the potential disadvantages of such above-Guidelines prison sentences. In contrast, section D discusses some of the challenges inherent in civil commitment and makes an affirmative argument for a system in which mentally ill defendants receive the same prison sentences as non–mentally ill defendants, but are civilly committed after prison as necessary. Section E concludes.

A. The Federal Sentencing Guidelines and Mentally Ill Offenders

The Sentencing Reform Act of 1984[7] (SRA) created the U.S. Sentencing Commission to promulgate binding sentencing guidelines in response to a regime of indeterminate sentencing characterized by broad judicial discretion over sentencing and the possibility of parole.[8] The Act sought to create a transparent, certain, and proportionate sentencing system, free of "unwarranted disparity" and able to "control crime through deterrence, incapacitation, and the rehabilitation of offenders"[9] by sharing power over sentencing policy and individual sentencing outcomes among Congress, the federal courts, the Justice Department, and probation officers.[10]

The heart of the Guidelines is a one-page table: the vertical axis is a forty-three-point scale of offense levels, the horizontal axis lists six categories of criminal history, and the body provides the ranges of months of imprisonment for each combination of offense and criminal

required to issue a public, written sentencing opinion and are in practice only asked to provide very anemic information for appellate review. Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 147 (2006), http://www.thepocketpart.org/2006/07/chanenson.html. The U.S. Sentencing Commission and other agencies collect data on sentencing, but whether offenders are mentally ill is not a datum that the Commission collects. *See* U.S. SENTENCING COMM'N, 2006 ANNUAL REPORT 31–46 (2006), *available at* http://www.ussc.gov/ANNRPT/2006/chap5_06.pdf.

[6] This Part does not seek to define mental illness; instead, it focuses on cases where courts believe that they are dealing with someone who is mentally ill.

[7] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[8] *See* Bowman, *supra* note 2, at 1318–23; *see also* Mistretta v. United States, 488 U.S. 361, 363 (1989).

[9] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING, at iv (2004), *available at* http://www.ussc.gov/15_year/executive_summary_and_preface.pdf.

[10] *See* Bowman, *supra* note 2, at 1319.

history.[11] A sentencing judge is meant to use the guidelines, policy statements, and commentaries contained in the other 600-odd pages of the Guidelines Manual to identify the relevant offense and history levels, and then refer to the table to identify the proper sentencing range.[12] Though in all cases a sentence must be at or below the maximum sentence authorized by statute for the offense,[13] in certain circumstances the Guidelines allow for both upward and downward departures from the sentence that would otherwise be recommended.

Few of these circumstances involve the mental illness of an offender; in fact, the Guidelines deal explicitly with mentally ill offenders in only a limited way.[14] Section 5H1.3 of the Guidelines sets the tone, stating that "[m]ental and emotional conditions are not ordinarily relevant in determining whether a departure [from the range of sentences that would otherwise be given under the Guidelines] is warranted, except as provided in [the Guidelines sections governing grounds for departure]."[15] In general terms, that section permits departure from the Guidelines if there is an aggravating or mitigating circumstance "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," and if the departure advances the objectives set out in 18 U.S.C § 3553(a)(2), which include elements of incapacitation, deterrence, rehabilitation, and retribution.[16] Downward departure is allowed when an offender suffers from a "significantly reduced mental capacity" and neither violence in the offense nor the offender's criminal history indicates a need to protect the public.[17]

This reticence is not wholly surprising: the Guidelines came along soon after the John Hinckley acquittal had helped turn public sentiment against the insanity defense[18] and at a time when the criminal justice system and the nation more generally were coping with the mass deinstitutionalization of the nation's mentally ill population.[19]

[11] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, at 392 (2007).

[12] *See id.* § 1B1.1; Bowman, *supra* note 2, at 1324–25.

[13] *See* Bowman, *supra* note 2, at 1322.

[14] Interestingly, the Guidelines deal more extensively with crimes *against* the mentally ill, providing for heightened sentences for those committing crimes against victims deemed incompetent because of mental illness. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(10)(D) & cmt. n.20(B).

[15] *Id.* § 5H1.3.

[16] *Id.* § 5K2.0(a)(1).

[17] U.S. SENTENCING GUIDELINES MANUAL § 5K2.13. Although there is no necessary connection between a violent offense and future risk to the public, most courts construing section 5K2.13 have taken the position that an offense involving violence or the threat of violence disqualifies an offender from a downward departure under this section. *See* Eva E. Subotnik, Note, *Past Violence, Future Danger?: Rethinking Diminished Capacity Departures Under Federal Sentencing Guidelines Section 5K2.13*, 102 COLUM. L. REV. 1340, 1340–43, 1354–57 (2002).

[18] *See* Ronald Bayer, *Insanity Defense in Retreat*, HASTINGS CENTER REP., Dec. 1983, at 13.

[19] *See* TERRY A. KUPERS, PRISON MADNESS, at xv, 11–14 (1999).

Moreover, the Guidelines were crafted to ensure that drug dependence, which is perhaps most reasonably viewed as mental illness, would not act to mitigate sentences.[20] These factors coincided with the rise of the idea that punishment should be measured by offenders' dangerousness and not merely their culpability.[21] A key implication of the Guidelines' silence on mental illness was that downward departures for the mentally ill, and hence the dangerous or drug addicted among them, were rarely permitted.

Along with discouraging downward departure in cases of mental illness, prior to *Booker*, the Guidelines only allowed upward departure on the basis of mental illness under section 5K2.0, for extraordinary circumstances not otherwise taken into account by the Guidelines.[22] Courts were left to determine what manifestations of mental illness counted as sufficiently extraordinary. The Ninth Circuit's decision in *United States v. Hines*[23] suggested that lurid details and the specter of dangerousness fueled by mental illness might in combination count as extraordinary circumstances. Roger Hines was convicted of making threats against the President and being a felon in possession of a firearm.[24] In addition to traveling to Washington, D.C., apparently in hopes of killing President George H.W. Bush, Hines kept a diary and wrote letters in which he claimed to have molested and killed children.[25] At sentencing, the court gave Hines an upward departure because of his "extraordinarily dangerous mental state" and "significant likelihood that he [would] commit additional serious crimes."[26] The Ninth Circuit upheld the sentence, arguing that although upward departures based on a need for psychiatric treatment are barred, the sentencing court had departed not to treat Hines but because "Hines posed an '*extraordinary danger* to the community because of his serious emotional and psychiatric disorders.'"[27]

[20] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 ("Drug or alcohol dependence or abuse is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime.").

[21] Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429–31 (2001).

[22] *See* United States v. Doering, 909 F.2d 392, 394–95 (9th Cir. 1990) (per curiam).

[23] 26 F.3d 1469 (9th Cir. 1994).

[24] *Id.* at 1473.

[25] *Id.* at 1472. Investigators found no evidence to corroborate these claims. *Id.*

[26] *Id.* at 1473 (quoting the district court's findings) (internal quotation marks omitted). The court justified this additional departure by reference both to Guidelines section 5K2.0 and to section 4A1.3, which allows departures where defendants' criminal histories do not adequately reflect their dangerousness. *Hines*, 26 F.3d at 1477. *But see* U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2007) (enumerating the circumstances, which do not include mental illness, that may justify departures on these grounds).

[27] *Hines*, 26 F.3d at 1477.

The *Hines* court appeared to ignore the fact that in the criminal justice system — a system designed to deal with deviations from normal behavior — manifestations of mental illness are the stuff of everyday life.[28] In contrast, the Sixth Circuit in *United States v. Moses*[29] maintained that mental illness made poor grounds for extraordinary departures. The defendant, Dewain Moses, was a paranoid schizophrenic inhabited by "strange, violent fantasies" and "preoccupied with weapons" who had "overtly threatened the killings of several people, and fantasized the slaughter of still more."[30] He was convicted for making false statements in order to purchase guns and for receiving guns after having been adjudicated as a "mental defective."[31] In response to worries that Moses would cease taking the medications under which he had improved while in custody and return to his dangerous state, the sentencing court relied on section 5K2.0 of the Guidelines to give him a sentence almost six times greater than the sentence recommended by the Guidelines for his offense and criminal history.[32] The Sixth Circuit vacated the sentence, stating that, given the inclusion of section 5H1.3 in the Guidelines, upward departures for circumstances not taken into account in the drafting of the Guidelines did not apply to Moses.[33] Civil commitment, rather than an upward departure, was the appropriate mechanism for protecting the public.[34]

B. The Potential Impact of Booker *on Sentences for the Mentally Ill*

Following its decisions in *Apprendi v. New Jersey*[35] and *Blakely v. Washington*[36] on similar provisions in state sentencing schemes, the Supreme Court in *United States v. Booker* invalidated the provisions of the SRA that made the Guidelines mandatory, declaring them instead to be "effectively advisory."[37] *Booker* directed sentencing courts

[28] *Cf.* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 17 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf (reporting that over 300,000 mentally ill people may be in American prisons on any given day).

[29] 106 F.3d 1273 (6th Cir. 1997).

[30] *Id.* at 1275.

[31] *Id.*

[32] *Id.* at 1277.

[33] *Id.* at 1278–81.

[34] *See id.* at 1280; *cf.* United States v. Fonner, 920 F.2d 1330, 1334 (7th Cir. 1990) (noting that "[m]ental health is not a solid basis on which to depart upward," and that upward departures on the basis of a convict's potential to commit future crimes — perhaps due to mental illness — may impermissibly overlap with the recidivism penalties already included in the Guidelines). In particular, the Sixth Circuit noted that a civil commitment statute, 18 U.S.C. § 4246 (2000), was "directly designed to forestall [the danger to the community created by a convict's mental illness] through continued commitment after completion of the sentence." *Moses*, 106 F.3d at 1280.

[35] 530 U.S. 466 (2000).

[36] 542 U.S. 296 (2004).

[37] United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J., delivering the opinion of the Court in part).

to continue to consult the Guidelines, but did not make clear how they should go about doing so. In two subsequent cases, *United States v. Rita*[38] and *Gall v. United States*,[39] the Court clarified somewhat the advisory role of the Guidelines by explaining how appellate courts may review sentencing decisions in light of the Guidelines: the two cases together suggest that this post-*Booker* advisory role will not itself much limit the discretion of judges in sentencing.[40]

For mentally ill defendants, *Booker*'s main effect may have been to create a second pathway for judges to impose above-Guidelines sentences. As was the case before *Booker*, a judge may use sections 4A1.3, 5H1.3, and subpart 5K2 of the Guidelines to depart *within* the Guidelines themselves. However, judges may now also look to the sentencing factors in § 3553(a) to make variances *outside* the Guidelines framework. Section 3553(a) directs courts to impose sentences "sufficient, but not greater than necessary"[41] to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[,] to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[42] Because the Guidelines already reflect the Sentencing Commission's reasoned interpretation of the § 3553 factors,[43] in many areas of the law, courts may only rarely resort to this new avenue to deviate.[44] The sentencing of mentally ill offenders is not such an area. Section 5H1.3 of the Guidelines limits consideration of mental illness to extraordinary circumstances, but the opportunity to refer

38 127 S. Ct. 2456 (2007).

39 128 S. Ct. 586 (2007).

40 In *Rita*, the Court held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," 127 S. Ct. at 2462, but that "the presumption is not binding," and "does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case," *id.* at 2463. In *Gall*, the Court rejected the Eighth Circuit's requirement that "a sentence outside of the guidelines range must be supported by a justification that '"is proportional to the extent of the difference between the advisory range and the sentence imposed,"'" 128 S. Ct. at 594 (quoting United States v. Claiborne, 446 F.3d 884, 889 (8th Cir. 2006)), holding instead that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences — whether inside, just outside, or significantly outside the Guidelines range — under a deferential abuse of discretion standard," *id.* at 591.

41 18 U.S.C. § 3553(a) (2000 & Supp. IV 2004).

42 *Id.* § 3553(a)(2)(A), (a)(2)(C)–(D).

43 *See Rita*, 127 S. Ct. at 2463–64.

44 *Cf.* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 525, 537 (2007) (asserting that since *Booker*, judges have shown little inclination to depart from the Guidelines, in part because of feelings of institutional incapacity).

directly to § 3553(a) in addition to the Guidelines is an opportunity to consider mental illness despite this limitation.[45]

More, even in an advisory Guidelines regime, cases involving violent mentally ill defendants, if they produce any departures or variances at all, seem likely to produce upward ones. To begin with, recall that violent mentally ill offenders are not eligible for downward departure under section 5K2.13 of the Guidelines. Second, downward variances have proved much less likely than upward ones to be sustained on appeal.[46] The threat of being overturned might influence a judge to forgo varying downwards. Third, the wording of the § 3553(a) factors appears to encourage higher sentencing. The two factors that most obviously pertain to violent mentally ill defendants are "to protect the public from further crimes of the defendant"[47] and "to provide the defendant with needed . . . treatment in the most effective manner."[48] Considering the need to protect the community would, if it led to a variance at all, lead to an upward one. Similarly, it seems unlikely that the need to provide a violent mentally ill defendant with effective treatment would lead to a downward variance from the Guidelines.[49] Finally, when confronted with an obviously mentally ill defendant in a courtroom accompanied by the lurid particularities of illness and violent crimes, judges may react by seeking to remove the frightening person before them from society for as long as possible.

This last point merits further discussion. Judge Easterbrook once said of jurors that "[w]hat little scientific data we possess implies that trying to persuade the jury that the accused is mentally ill is worse than no defense at all. . . . [I]f persuaded that the defendants are indeed nutty, jurors believe that death is the only sure way to prevent

[45] *See Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring) ("Matters such as age, education, [or] mental or emotional condition . . . are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider.") (citation omitted).

[46] *See* Regina Stone-Harris, *How To Vary from the Federal Sentencing Guidelines Without Being Reversed*, 19 FED. SENT'G REP. 183, 185–86 (2007); *see also* United States v. Meyer, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (opinion of Heaney, J.) (noting that since *Booker*, the Eighth Circuit had upheld twelve of thirteen sentences exceeding the Guidelines range, but had reversed sixteen of nineteen sentences lower than the Guidelines range). However, this trend may change with *Gall* and its directive that all sentences must be given abuse of discretion review. Gall v. United States, 128 S. Ct. 586, 591 (2007); *see also id.* at 595 (rejecting "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range").

[47] 18 U.S.C. § 3553(a)(2)(C).

[48] *Id.* § 3553(a)(2)(D). *But see id.* § 3553(a)(2)(A) (calling for "just punishment for the offense").

[49] *Cf.* United States v. Mora-Perez, 230 F. App'x 836, 838 (10th Cir. 2007) (affirming a district court's refusal of a sentence below the Guidelines range on mental illness grounds for a previously deported alien convicted of illegal reentry, where the sentencing court refused to give the lower sentence because it believed the defendant would receive better treatment for his mental illness in prison than in his home country of Mexico).

future crimes."[50] Judges may not be driven to the same conclusion, but there is reason to think that they are subject to the same possibility of feeling fear and distaste.[51] This is not to claim that every judge, when faced with such a defendant, will seek to impose an upward departure or variance based on these effects; only that the possibility exists. Nor is it to claim that judges are biased against the mentally ill in the abstract; only that some may find it difficult to control their reactions to the mentally ill defendants they face in court.[52] While in general a system that empowers judges may be the best hope for justice,[53] in the case of mental illness, in which there is little to suggest that a judge will be any less susceptible to fear or revulsion than jurors, or particularly skilled at judging future dangerousness, judicial discretion has the potential to produce unjust sentences.

Cases since *Booker* bear out the above analysis. In a recent case with some resemblance to *Hines*, a convicted murderer who wrote letters from prison threatening to kill the President was sentenced by the district court to the statutory maximum of 60 months, an upward variance from the recommended Guidelines sentence.[54] In a memorandum opinion upon resentencing, the court offered a justification for its sentence for each of the § 3553(a) factors, but saved the bulk of its analysis for why the sentence was necessary "to protect the public from further crimes of the defendant."[55] The upward variance was necessary because "[t]he defendant's history of violent conduct, coupled with his obvious unstable mental condition . . . strongly suggest that [he] should never again be pardon [sic], paroled, or released into society."[56]

[50] Holman v. Gilmore, 126 F.3d 876, 883 (7th Cir. 1997); *see also* Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 172–73 (2005) ("[P]eople have a variety of views of persons with mental illness that include seeing them as different, less than human, [or] dangerous and frightening").

[51] *Cf.* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (arguing that like jurors, judges generally have difficulty not being influenced by relevant but inadmissible evidence). For a general discussion and some confirmatory evidence of the biases and cognitive illusions from which judges suffer, see Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

[52] Compare the neutral and even sympathetic stance of the Guidelines, which are prepared in general, abstract terms by a commission, some of whose members are judges, *see supra* pp. 1134–35, with the almost hysterical tone of the sentencing judge in *United States v. Cousins*, No. 5:04-CR-169, 2007 WL 1454275 (N.D. Ohio May 17, 2007), discussed below.

[53] *See* Wright, *supra* note 3, at 139.

[54] *Cousins*, 2007 WL 1454275, at *2–4. The sentencing court found in the alternative that a sixty-month sentence was justified under the Guidelines because Cousins's threat during the sentencing process to kill the judge's wife was close enough to his original crime of threatening to kill the President's wife to negate the reduction Cousins had received for showing contrition. *Id.* at *2.

[55] *See id.* at *7–8.

[56] *Id.* at *8.

A similar line of reasoning motivated *United States v. Gillmore*,[57] in which the Eighth Circuit upheld a 110% upward variance for a murder conviction, to 396 months, for a woman suffering from depression and Post-Traumatic Stress Disorder who, while trying to obtain money to buy drugs, killed a man with a hammer and a knife, then attempted to burn down his house to cover up the murder.[58] The district court found that "Gillmore's history of sexual abuse, chemical dependency, and mental illness . . . made her a danger to herself and the public, warranting a significantly longer sentence than the Guidelines range."[59] Like the district court in *Cousins*, the Eighth Circuit pointed to the need to protect the public as justification for the sentence.[60]

C. Above-Guidelines Sentences for Violent Mentally Ill Offenders

Imposing upward departures or variances on violent mentally ill defendants is an approach to protecting the public and treating such defendants that appears to fail both the public and the defendants. On the one hand, applying the § 3553 factors to impose an above-Guidelines sentence assumes a continuing need to protect the public and treat the offender in a confined setting — that the offender's dangerousness and need for treatment are immutable. If an offender, no matter the treatment he receives in prison, truly is so dangerous and so certain to reoffend as to warrant lengthening his sentence, using § 3553 to extend his sentence by adding years of imprisonment up to the statutory maximum offers only flawed protection to society; the next offense is merely postponed, not foreclosed.[61]

On the other hand, and just as importantly, this approach is unfair to the mentally ill defendant. Above-Guidelines sentences are imposed before prison and treatment, and do not account for the possibility that treatment will in fact work: that the offender may improve and no longer require incarceration.[62] Moreover, there is reason to think that judges have little ability to determine accurately the future dangerousness of a defendant.[63] When an offender is held in prison because of a

[57] 497 F.3d 853 (8th Cir. 2007).

[58] *See id.* at 854–58.

[59] *Id.* at 857.

[60] *See id.* at 861.

[61] Alternatively, if the defendant is not so immutably dangerous and, as such, is being imprisoned for no purpose, society may be harmed by a loss to the criminal justice system's moral credibility and a resulting loss of crime-control power. *See* Robinson, *supra* note 21, at 1455.

[62] Though "studies strongly suggest that prison often exacerbates psychiatric disabilities," Michael J. Sage et al., *Butler County SAMI Court: A Unique Approach to Treating Felons with Co-Occurring Disorders*, 32 CAP. U. L. REV. 951, 953 (2004), the possibility that mentally ill prisoners might grow worse in prison is no reason to either keep them there longer or fail to make allowances for those who do improve.

[63] *See* Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L. REV. 1845, 1845 (2003) (noting that

finding of dangerousness premised on a mental illness now controlled or in remission, that offender is being denied a fundamental liberty right.[64] Perhaps this dynamic is best understood in terms of the purposes of punishment outlined in § 3553(a). Where departure or variance is based on a dangerousness founded in mental illness, once the Guidelines-recommended sentence is exhausted, the retributive purposes of the punishment have been fulfilled — such an offender is not being retained because his potential dangerousness or need for treatment makes him more deserving of punishment. Nor is deterrence at issue; manifestations of mental illness are considered undeterrable.[65] Only rehabilitation and incapacitation remain, but ex ante upward departures and variances ignore the possibility of rehabilitation, and impose purposeless incapacitation if rehabilitation is achieved.[66]

D. Civil Commitment and Its Challenges

The most obvious alternative to upward departures and variances for violent mentally ill offenders is civil commitment following prison. In the ideal, at least, commitment keeps the mentally ill confined and in treatment only so long as they display the symptoms that make them dangerous to the public. Indeed, there is a federal commitment statute, 18 U.S.C. § 4246, that provides for the commitment of a "person in the custody of the Bureau of Prisons whose sentence is about to expire" who "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another."[67]

Civil commitment following prison may not, however, be a perfect solution for dealing with violent mentally ill offenders. First, it is possible that the interrelation between retribution, treatment, and incapacitation is somewhat more nuanced than what was suggested above. Perhaps, to society — and to judges — a violent mentally ill person who has served out a Guidelines sentence is not blameless. Perhaps

neither psychiatrists nor non–mental health professionals — nor, presumably, judges — have any ability to accurately predict an individual's future dangerousness); Robinson, *supra* note 21, at 1452 ("It is difficult enough to determine a person's present dangerousness — whether he would commit an offense if released today. It is much more difficult to predict an offender's future dangerousness It is still more difficult, if not impossible, to predict today precisely how long a preventive detention will need to last.").

[64] *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [T]here is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."); *see also* Subotnik, *supra* note 17, at 1359–60 (arguing that dangerousness determinations under the Guidelines should take into account the potential that treatment might mitigate dangerousness).

[65] *See* Kansas v. Hendricks, 521 U.S. 346, 362–63 (1997).

[66] *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005).

[67] 18 U.S.C. § 4246(a) (2000).

once an individual is deemed blameworthy, all that follows, even treatment and incapacitation for the public safety, is tarred by the initial retributive purpose. Evidence for this possibility can be found in the text of § 3553, which plainly allows incarceration, rather than commitment, in order to protect the public and treat the offender.

Second, commitment is itself complicated.[68] It is not, for instance, clear that a violent mentally ill offender would actually be committed and, if committed, receive treatment. Commitment statutes are, with good reason, designed at least as much to avoid committing the sane as to provide an alternative to prison for the dangerously insane. A commitment statute is constitutionally sustainable if it combines "proof of serious difficulty in controlling behavior"[69] and "proof of dangerousness [coupled] with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"[70] Moreover, no one besides the director of the facility in which the offender is held before the end of his sentence can petition to have the offender committed.[71] An offender who is still dangerous or might become dangerous immediately after release might not be committed in light of these protections, perhaps most plausibly in a case where an offender's symptoms improve while being treated in custody but worsen when the offender ceases treatment post-release.[72] In addition, offenders who are committed will not always get treatment, removing some of whatever difference exists between commitment and imprisonment.[73] Commitment without treatment may last indefinitely, a result far harsher than a fixed prison term.

[68] However, this complication does not extend to the legal question of whether commitment may immediately follow a prison sentence. So long as the commitment is not intended to punish the offender or to deter the offender or others in the offender's situation, and normal requirements for commitment are met, the commitment is civil and so does not violate the Constitution's prohibition on double jeopardy. *See Hendricks*, 521 U.S. at 370. The state's task is made easier by the Supreme Court's willingness to posit that commitment statutes for the mentally ill are not intended to deter, since persons with a mental abnormality are unlikely to be deterred by the threat of confinement. *See id.* at 361–63.

[69] Kansas v. Crane, 534 U.S. 407, 413 (2002). In *Hendricks*, the Court had suggested that a finding of mental illness would be sufficient "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. In *Crane*, it modified this position to include a specific volitional element so as to limit commitment to the seriously mentally ill, rather than the "dangerous but typical recidivist." 534 U.S. at 413. At issue in *Hendricks*, *Crane*, and much of the recent scholarship on civil commitment was the post-prison commitment of sex offenders.

[70] *Hendricks*, 521 U.S. at 358.

[71] *See* United States v. Moses, 106 F.3d 1273, 1280–81 (6th Cir. 1997).

[72] Consider the sentencing court's concern in *Moses*, *id.* at 1280.

[73] The current state of the law appears to be that a state need not provide treatment to an individual who has been committed if that individual suffers from an untreatable condition. *See Hendricks*, 521 U.S. at 367; Saul J. Faerstein, *Sexually Dangerous Predators and Post-Prison Commitment Laws*, 31 LOY. L.A. L. REV. 895, 897 (1998).

Post-prison civil commitment is far from a perfect solution for dealing with violent mentally ill offenders. It seems, nevertheless, a better solution than giving such offenders above-Guidelines prison sentences. To impose post-prison civil commitment, the state is required to prove an offender's continuing dangerousness by clear and convincing evidence,[74] whereas an above-Guidelines prison sentence relies on a possibly unreliable prediction of what the offender's mental health will be at the end of the Guidelines sentence. Not all offenders will require confinement past the Guidelines range, and an option like civil commitment that allows those offenders their freedom at the point non–mentally ill offenders would receive theirs must be preferred. Prison presents an extremely unhealthy environment for the mentally ill,[75] and it is difficult to advocate any solution that extends a mentally ill person's time behind bars.

E. Going Forward

If post-prison commitment is preferable to above-Guidelines prison sentences as a means of dealing with violent mentally ill offenders, what measures might ensure that all such offenders get the one and not the other? At least two possibilities exist. First, there are some situations in which judicial discretion might be less desirable than in others. Defendants who have the potential to elicit strong reactions from judges, like violent mentally ill offenders, may in fact be better dealt with by abstracted, preformulated rules than by judges steeped in, and perhaps spooked by, the particulars of the situation. It may, for instance, make the most sense to recraft the standards of review for sentences such that upward departures and variances from the Guidelines in cases with mentally ill defendants are presumptively unreasonable. Alternatively, rather than force judges to sentence in a particular way, it might be possible to allay any fears they have that violent mentally ill offenders will slip through the cracks and not be committed post-prison, despite their continued dangerousness. One possibility would be to allow prosecutors — in addition to the directors of the facilities in which violent mentally ill offenders are held — to initiate commitment proceedings for such offenders, subject to strictures designed to prevent abuse or overuse.

[74] *See, e.g.*, 18 U.S.C. § 4246(d) (2000).

[75] *See* Sage et al., *supra* note 62, at 952–53; *see also* Nancy Wolff et al., *Rates of Sexual Victimization in Prison for Inmates with and Without Mental Disorders*, 58 PSYCHIATRIC SERVICES 1087, 1087 (2007) (reporting that the rate of sexual victimization of mentally ill inmates is nearly three times as high as for those without mental illness).

IV. THE IMPACT OF THE PRISON LITIGATION REFORM ACT ON CORRECTIONAL MENTAL HEALTH LITIGATION

Over the last four decades, prisons have replaced mental institutions as warehouses of the mentally ill.[1] The U.S. Department of Justice (DOJ) estimates that over one and a quarter million people suffering from mental health problems are in prisons or jails, a figure that constitutes nearly sixty percent of the total incarcerated population in the United States.[2] Yet psychiatric treatment in many correctional facilities is impaired by understaffing and underfunding, leaving many inmates with little if any therapy.[3] The mentally ill often have a particularly difficult time coping with prison conditions and complying with regulations.[4] In turn, many prison officials treat disordered behavior as disorderly behavior, responding with disciplinary measures that may reinforce the unavailability of treatment and exacerbate the illnesses contributing to the inmates' conduct.[5]

Consider one representative facility: Taycheedah Correctional Institution, a women's facility in Fond du Lac, Wisconsin. The DOJ inspected Taycheedah in 2005 and found that the prison failed "to provide for inmates' serious mental health needs."[6] As of the DOJ's report in 2006, two part-time psychiatrists attended to the approximately 600 prisoners at Taycheedah, leading to waits of two to four weeks before inmates received even an intake mental health screening and waits of up to four months before inmates diagnosed with mental illnesses saw a psychiatrist.[7] Medications were monitored by untrained correctional officers who were unable "to ensure that medication [was] taken properly or to identify the signs of potentially dangerous adverse reactions," which, for many medications, carry a significant risk of death.[8] Taycheedah "impose[d] a significant penalty on inmates whose behaviors [were] symptomatic of their mental illness" by placing them "in administrative segregation due to threats or

1 *See* TERRY A. KUPERS, PRISON MADNESS, at xv–xvi, 12–14 (1999).

2 DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf.

3 *See generally* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 94–126 (2003) [hereinafter ILL-EQUIPPED], *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf.

4 *See id.* at 53–69; KUPERS, *supra* note 1, at 15–25.

5 *See* ILL-EQUIPPED, *supra* note 3, at 75–86; KUPERS, *supra* note 1, at 29–38; Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 395–405 (2006).

6 Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Jim Doyle, Governor of Wis. 2 (May 1, 2006) [hereinafter Doyle Letter], *available at* http://www.usdoj.gov/crt/split/documents/taycheedah_findlet_5-1-06.pdf.

7 *Id.* at 3–7.

8 *Id.* at 6.

attempts to kill themselves";[9] one inmate, for example, was placed in administrative segregation for punching herself in the eye.[10] Inmates in segregation received no treatment except for medication; even in the specialized unit for mentally ill inmates, the DOJ found a "lack of active treatment" that created "a high risk of exacerbating psychiatric symptoms and dangerous behavior."[11]

Institutional reform litigation is an essential tool for improving correctional mental health care and the treatment of the incarcerated mentally ill. However, such suits became far more difficult to bring, win, and enforce with the passage of the Prison Litigation Reform Act of 1995[12] (PLRA). This legislation was intended to reduce frivolous litigation and to curb judicial micromanagement of prisons;[13] its sponsors disavowed a desire to impede meritorious claims.[14] Yet the PLRA has inarguably made many legitimate claims harder to pursue.[15]

Although the effect of the PLRA on litigants generally has been extensively discussed,[16] its particular hardships for mentally ill inmates have not been analyzed. This Part will discuss provisions of the PLRA that particularly affect suits to redress deficits in correctional mental health care or mistreatment of the incarcerated mentally ill; it will also consider interpretations that moderate, although by no means erase, some of the serious impediments the PLRA has placed between mentally ill prisoners and the courts. Section A will look at the PLRA's strict administrative exhaustion requirement[17] and argue that the "availability" of grievance procedures should be judged in terms of the personal capacity of mentally ill inmates to avail themselves of

9 *Id.* at 10–12. Although administrative segregation at Taycheedah is not described in the letter, such segregation frequently involves conditions of total isolation that are particularly damaging for the mentally ill. *See infra* pp. 1153–54.

10 Doyle Letter, *supra* note 6, at 11.

11 *Id.* at 9.

12 Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

13 For a brief legislative history of the PLRA, see *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1853–56 (2002). *See generally* A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996 (Bernard D. Reams, Jr. & William H. Manz eds., 1997).

14 *See* Anh Nguyen, Comment, *The Fight for Creamy Peanut Butter: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 155 (2007) (quoting Sens. Thurmond and Hatch as expressing the intent that the PLRA bar only frivolous claims).

15 *See generally* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001); Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655 (2002).

16 The most thorough primer on the PLRA is John Boston's unpublished treatise, John Boston, The Prison Litigation Reform Act (2006), *available at* http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf.

17 42 U.S.C. § 1997e(a) (2000).

those procedures. Section B will suggest a reading of the PLRA's "physical injury" requirement[18] that is more cognizant of the physical nature of severe mental illness. Last, Section C will analyze the effect of the PLRA's reduction of the volume of prison litigation on the body of "clearly established" Eighth Amendment law and propose an alternate source of applicable precedent.

A. The "Availability" of Administrative Remedies to Acutely Mentally Ill Inmates

1. The Exhaustion Requirement and the Mentally Ill. — The PLRA's most significant limitation on access to courts might be 42 U.S.C. § 1997e(a), which requires that prisoners exhaust "such administrative remedies as are available" before filing actions "with respect to prison conditions."[19] Courts must dismiss any claim for which the plaintiff failed to comply with the confining institution's grievance procedures. Prior to the passage of the PLRA, grievance procedures had to be, among other things, "plain, speedy, and effective" before a court could bar a claim for failure to exhaust.[20] The PLRA made exhaustion mandatory and removed all substantive constraints on the rigor of grievance procedures.[21] Many institutions' procedures feature short windows in which prisoners must file or appeal their claims[22] while some leave officials significant discretion as to response time.[23]

As high a hurdle as the PLRA sets for any inmate, it is even higher for the mentally ill. Many grievances arise during acute psychotic breaks or other periods of decompensation, when inmates may be temporarily incapable of complying with grievance procedures.[24] Ad-

[18] *Id.* § 1997e(e).

[19] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1649 (2003) ("The PLRA's exhaustion requirement has emerged as the highest hurdle the statute presents to individual inmate plaintiffs.").

[20] 42 U.S.C. § 1997e(a)(1) (1994).

[21] *See id.* § 1997e(a) (2000). *See generally* Woodford v. Ngo, 126 S. Ct. 2378, 2382–83 (2006); Schlanger, *supra* note 19, at 1627–28.

[22] Rhode Island, for example, requires that grievants file complaints "within three (3) days of the incident and/or actual knowledge of the origination of the problem," 06-070-002 R.I. CODE R. § 10 (Weil 2007), LEXIS, RIADMN File, and that they fulfill three levels of appeals, each similarly limited to three-day windows, *id.* § 5(B)(10), (C)(1), (D)(1), E(2). For a list of grievance procedures around the country, see Brief of the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondents, at app., *Ngo*, 126 S. Ct. 2378 (No. 05-416), *available at* http://www.law.yale.edu/documents/pdf/woodford_ngo/Woodford_Amicus_brief.pdf.

[23] *See, e.g.*, ILL. ADMIN. CODE tit. 20, §§ 504.830(d), .850(f) (2007), LEXIS, ILADMN File (officials given two months to respond to grievances and six months to respond to appeals, but need only adhere to deadlines "where reasonably feasible under the circumstances").

[24] *See, e.g.*, Whitington v. Sokol, 491 F. Supp. 2d 1012, 1014 (D. Colo. 2007) (plaintiff was in a psychotic state throughout grievance window); Bakker v. Kuhnes, No. C01-4026-PAZ, 2004 WL 1092287 (N.D. Iowa May 14, 2004) (improperly medicated plaintiff experienced symptoms includ-

ditionally, drawn-out grievance procedures may produce months-long gaps in care before an inmate can seek an injunction to compel treatment.[25] In addition, many inmates fear losing access to medication or other forms of treatment as retaliation for filing grievances.[26]

2. Exceptions to Exhaustion. — Whether federal courts provide any recourse for plaintiffs who were temporarily (or permanently) incapable of completing grievance procedures turns on their interpretation of the PLRA's requirement that plaintiffs exhaust "such administrative remedies *as are available*."[27] A grievance procedure is arguably "unavailable" to a prisoner who cannot comply with it.[28] Indeed, one court recently held that a prisoner who was transferred to a state hospital while "'mentally incompetent' and 'psychotic'" might be incapable of grieving and thus have no available procedures to exhaust.[29]

Although this definition of availability based on personal characteristics has rarely been considered by courts,[30] some circuits interpret the statute as requiring more than the mere existence of procedures. First, several circuits have held that exhaustion is satisfied where prison officials' conduct made procedures effectively unusable.[31] The Second Circuit has the most robust form of this allowance, holding that "'special circumstances' may excuse a prisoner's failure to exhaust."[32] This exception is usually invoked for unclear or reasonably misinterpreted

ing seizures and dizziness during his grievance window); *cf.* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 310–15 (2006) (describing difficulties mentally ill inmates face in complying with habeas corpus deadlines).

25 *See, e.g.*, Pratt v. Valdez, No. 3:05-CV-2033-K, 2005 U.S. Dist. LEXIS 30917, at *5 (N.D. Tex. Dec. 1, 2005) (rejecting argument that the plaintiff's need for immediate health treatment justified filing suit before the jail responded to his grievance).

26 Telephone Interview with Amy Fettig, Staff Counsel, ACLU Nat'l Prisons Project (Sept. 21, 2007); *see also* Boston, *supra* note 15, at 431 n.7 (compiling cases of "retaliation against prisoners who complain about their treatment, including those who use the grievance systems that the PLRA has now made mandatory").

27 42 U.S.C. § 1997e(a) (2000) (emphasis added).

28 *See* Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (per curiam) ("[O]ne's personal ability to access the grievance system could render the system unavailable.").

29 *Whitington*, 491 F. Supp. 2d at 1014–15.

30 *See* Boston, *supra* note 16, at 114–15 ("[C]ourts have only begun to acknowledge the question whether administrative remedies are 'available' to prisoners who may lack the capacity to use them, by reason of mental illness or developmental disability").

31 *See, e.g.*, Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("[A] remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a)"); *see also* Giano v. Goord, 380 F.3d 670, 675 (2d Cir. 2004); Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002). *See generally* Boston, *supra* note 16, at 114–23. The majority in *Woodford v. Ngo*, 126 S. Ct. 2378 (2006), expressly deferred this question. *See id.* at 2392–93.

32 *Giano*, 380 F.3d at 675 (quoting Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2003)); *see also* Vega v. U.S. Dep't of Justice, No. 1:CV-04-02398, 2005 U.S. Dist. LEXIS 29740, at *16 (M.D. Pa. Nov. 4, 2005) (noting, though not applying, the special circumstances exception); Baker v. Andes, No. 6:04-343-DCR, 2005 U.S. Dist. LEXIS 43469, at *25–26 (E.D. Ky. May 12, 2005) (finding that "special circumstances" existed).

grievance procedures[33] and has not yet been extended to cover non-exhaustion due to mental incapacity. A second doctrinal strand allows "substantial compliance" with grievance procedures to suffice for exhaustion.[34] These exceptions to proper exhaustion do not control the availability question,[35] but they signify courts' general attitude toward whether procedures must, in context, provide "a 'meaningful opportunity for prisoners to raise meritorious grievances.'"[36]

3. The Case for Personal Availability. — A contextual definition of availability recognizing personal capability is both preferable as a prudential matter and required under antidiscrimination principles. Even the majority in *Woodford v. Ngo*[37] recognized that "exhaustion requirements are designed to deal with parties who *do not want* to exhaust"[38] — not parties who are *incapable* of exhausting. An incentive mechanism has no benefit when applied against individuals who cannot change their behavior.

Moreover, a personal definition of availability may be necessary to avoid violating the Constitution and is certainly required to avoid a conflict with the Americans with Disabilities Act[39] (ADA). As many commentators have noted with regard to other provisions of the PLRA,[40] the Act seriously limits access to the courts; if its effects are

33 *See, e.g.*, Hemphill v. New York, 380 F.3d 680, 690 (2d. Cir. 2004).

34 *Compare* Artis-Bey v. District of Columbia, 884 A.2d 626, 639 (D.C. 2005) ("[P]rocedural defects in an inmate's pursuit of administrative remedies do not bar a civil suit *per se*, provided that the inmate substantially complied with the established procedure"), *with* Lewis v. Washington, 300 F.3d 829, 834 (7th Cir. 2002) (declining to adopt the substantial compliance exception for post-PLRA causes of action).

35 In addition, the validity of substantial compliance and the "special circumstances" exception is in some doubt after *Ngo*, which held that the PLRA required "proper exhaustion" of grievances. As Justice Breyer's concurrence makes clear, the majority opinion leaves room for some exceptions to exhaustion. 126 S. Ct. at 2393 (Breyer, J., concurring). Indeed, at least one circuit still finds "substantial compliance" sufficient after *Ngo*. *See* Roscoe v. Dobson, No. 07-1418, 2007 U.S. App. LEXIS 22773, at *4 (3d Cir. Sept. 25, 2007); *see also* Guillory v. Rupf, No. C-05-4395-CW, 2007 U.S. Dist. LEXIS 76122, at *15–16 (N.D. Cal. Sept. 27, 2007). The Second Circuit has expressly reserved the question of whether its special circumstances exception survives *Ngo*. *See, e.g.*, Reynoso v. Swezey, 238 F. App'x 660, 662 (2d Cir. 2007); *see also* Robin L. Dull, Note, *Understanding Proper Exhaustion: Using the Special-Circumstances Test To Fill the Gaps Under* Woodford v. Ngo *and Provide Incentives for Effective Prison Grievance Procedures*, 92 IOWA L. REV. 1929, 1953–55 (2007) ("The special-circumstances framework for proper exhaustion probably remains good law post-*Ngo*.").

36 *Ngo*, 126 S. Ct. at 2403 (Stevens, J., dissenting) (quoting *id.* at 2392 (majority opinion)).

37 126 S. Ct. 2378.

38 *Id.* at 2385 (emphasis added).

39 42 U.S.C. §§ 12101–12213 (2000).

40 *See* Randal S. Jeffrey, *Restricting Prisoners' Equal Access to the Federal Courts: The Three Strikes Provision of the Prison Litigation Reform Act and Substantive Equal Protection*, 49 BUFF. L. REV. 1099 (2001) (arguing that the PLRA's "three strikes" rule violates the Equal Protection Clause); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000) (arguing that PLRA's physical injury requirement cannot withstand strict scrutiny); Julie M. Riewe, Note, *The*

so great as to deny certain individuals "the fundamental constitutional right of access to the courts,"[41] its provisions must be subjected to strict scrutiny.[42] Although appellate courts have consistently held that PLRA provisions increasing the cost of suit do not warrant heightened scrutiny,[43] they have yet to consider the impact of the exhaustion requirement as applied to a prisoner who is incapable of complying with grievance procedures.[44] Unlike the cost provisions, which are surmountable in theory (if not in practice, for many defendants), a strict exhaustion requirement as applied to prisoners who are mentally incapable of complying with grievance procedures bars access to courts altogether, a fundamental detriment that should receive strict scrutiny.

Even if an acontextual understanding of "availability" were to withstand strict scrutiny, or was found not to implicate fundamental rights, it would still have a severe exclusionary effect on the acutely mentally ill. Although the disabled, including the mentally ill, are not a suspect class for the purposes of the Equal Protection Clause,[45] they are protected by the ADA,[46] which mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[47] Given that Congress expressed no intent to supersede the ADA in the context of disabled prisoners, § 1997e(a) should be read in harmony with the ADA by incorporating a definition of availability that recognizes personal capability.

Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995, 47 DUKE L.J. 117 (1997) (arguing that PLRA's filing fee, three strikes rule, and physical injury requirement are unconstitutional).

41 Bounds v. Smith, 430 U.S. 817, 828 (1977); *see also* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

42 *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7, at 1454 (2d ed. 1988) ("Legislative and administrative classifications are to be strictly scrutinized . . . if they distribute benefits or burdens in a manner inconsistent with fundamental rights.").

43 *See, e.g.*, Johnson v. Daley, 339 F.3d 582, 586 (7th Cir. 2003) (holding that cap on fee-shifting did not implicate a fundamental right); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) (same with respect to three strikes rule); Tucker v. Branker, 142 F.3d 1294, 1299–1301 (D.C. Cir. 1998) (same with respect to filing fee provisions).

44 *Cf.* Woodford v. Ngo, 126 S. Ct. 2378, 2404 (2006) (Stevens, J., dissenting) (arguing that a strict exhaustion requirement would be subject to "searching judicial examination under the Equal Protection Clause").

45 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

46 Albeit weakly; recent Supreme Court rulings have made it far harder for the mentally ill to claim the protections of the ADA. *See* Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 723–24 (2004) ("The problem mentally ill plaintiffs face under the ADA [in employment discrimination cases] . . . is practically insurmountable.").

47 42 U.S.C. § 12132 (2000).

B. Mental Illness as a "Physical Injury"

The PLRA provision that seems on its face to strike the gravest blow against mental health litigation is 42 U.S.C. § 1997e(e), which provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[48] This physical injury requirement's reach has been judicially cabined, however, as appellate courts have unanimously interpreted it to permit suits for injunctive and declaratory relief;[49] most circuits to consider the issue have found it to allow recovery of nominal or punitive damages as well.[50]

The physical injury requirement thus predominantly affects suits for compensatory damages. For mentally ill inmates, these claims have been made even harder by courts that disregard the fact that severe mental distress has a physical substrate[51] and deny that at least some kinds of mental suffering constitute physical injuries in and of themselves.[52] Given that physical injury must be "more than *de minimis*" to pass the § 1997e(e) threshold,[53] a greater recognition of the physical reality of mental illness would cover severe injuries without drawing in the apparently marginal cases that courts regularly reject.[54]

The capacious phrase "mental or emotional injury" perhaps suggests that the statute should be read to bar claims dependent on a modern understanding of mental illness.[55] Nevertheless, the dearth of legislative history[56] might signal that Congress intended a more moderate change in the law, preserving suits for severe exacerbation of mental illness as a result of Eighth Amendment violations.[57] Several

[48] *Id.* § 1997e(e).

[49] *See* Boston, *supra* note 16, at 139–40 & nn.563–66 (collecting cases).

[50] *See id. But see* Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007) (prohibiting punitive damages); Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (same).

[51] *See generally* DENNIS S. CHARNEY & ERIC J. NESTLER, NEUROBIOLOGY OF MENTAL ILLNESS (2d ed. 2004).

[52] *See, e.g.*, Weatherspoon v. Valdez, No. 3-05-CV-0586-P, 2005 U.S. Dist. LEXIS 9451, *5–6 (N.D. Tex. May 17, 2005) ("Plaintiff claims only that he experiences 'pain and suffering,' 'moderate to severe depression,' and 'mood swings.' This is insufficient to establish 'physical injury' under the PLRA." (citation omitted)).

[53] *See* Boston, *supra* note 16, at 150.

[54] *See, e.g.*, Pearson v. Wellborn, 471 F.3d 732, 744 (7th Cir. 2006); Herman v. Holiday, 238 F.3d 660, 665–66 (5th Cir. 2001).

[55] Although there is no indication in the PLRA's legislative history that Congress considered the implications of the particular phrase used, the failure to use an established term such as "emotional distress," *see* BLACK'S LAW DICTIONARY 563 (8th ed. 2004), suggests that the statute's prohibition should not be limited to the tort system's conception of mental sequelae.

[56] *Cf.* Royal v. Kautzky, 375 F.3d 720, 730 n.5 (8th Cir. 2004) (Heaney, J., dissenting) ("[T]here is almost nothing in the legislative history as to § 1997e(e) at all.").

[57] The Eighth Amendment imposes upon prison officials a duty to ensure, among other things, "that inmates receive adequate . . . medical care," Farmer v. Brennan, 511 U.S. 825, 832 (1994),

courts have held that Congress did not intend § 1997e(e) to bar constitutional claims.[58] Although this contention is usually raised in support of constitutional claims such as First Amendment violations — claims in which the core harms are less tangible than those in the infliction or exacerbation of mental suffering — it is likely *stronger* with regard to substantial Eighth Amendment claims. Congress unquestionably *did* intend to prohibit some intangible rights claims; the litany of litigious excesses cited by supporters of the PLRA frequently included First Amendment claims.[59] By contrast, no legislator expressed an intent to exclude claims involving serious mental illness. Given the Supreme Court's dictum that "the integrity of the criminal justice system depends on full compliance with the Eighth Amendment,"[60] courts should preserve remedies for Eighth Amendment violations until Congress clearly expresses its intent to limit them.

C. Volume Reduction and the Elaboration of Constitutional Standards

1. The Importance of Clear Precedent to Correctional Litigation. — Another consequence of the PLRA's effort to reduce the volume of inmate litigation is a reduction in the number of reported decisions. Along with adding the substantive hurdles described above, Congress streamlined dismissal of prisoners' suits[61] and made filing more financially burdensome;[62] at the tail end of litigation, the PLRA made it more difficult to enter or maintain court orders for prospective relief,[63]

and to "take reasonable measures to guarantee the safety of the inmates," *id.* (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)) (internal quotation marks omitted). This obligation extends to mental health care, *see, e.g.*, Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004). Pretrial detainees' rights are protected under the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, and are "at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

58 *See* Boston, *supra* note 16, at 141 n.568 (compiling cases); *id.* at 142 ("[C]haracterizing [a First Amendment violation] as a mental or emotional injury seems to miss the point of constitutional protection"); *see also* Nguyen, *supra* note 14, at 164 ("To treat a constitutional rights claim as a mental or emotional injury claim is to ignore the true meaning of constitutional protection").

59 *See, e.g.*, 141 CONG. REC. 20,991–92 (1995) (statement of Sen. Reid); *id.* at 14,572 (statement of Sen. Kyl).

60 Johnson v. California, 543 U.S. 499, 511 (2005).

61 The PLRA empowered courts to dismiss claims sua sponte "if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c)(1) (2000), and instructed courts to do so as early as possible — "before docketing, if feasible or, in any event, as soon as practicable after docketing," 28 U.S.C. § 1915A(a).

62 *See* 28 U.S.C. § 1915(b), (f). The PLRA also limited attorneys' fees awards. *See* 42 U.S.C. § 1997e(d); *see also* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 593–94 (2006).

63 *See* 18 U.S.C. § 3626. Courts may only grant prospective relief if "the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.*

although it exempted private settlement agreements from its restrictions.[64] These provisions correlate with an unmistakable decrease in both inmate filings[65] and in ongoing court-order regulation of correctional facilities.[66]

This reduction in the volume of decisions has had the perhaps unintended effect of limiting judicial elaboration of standards for future cases. The clarity of such standards is especially important for plaintiffs' attempts to sue prison officials acting in their individual capacities, which are the only kind of Eighth Amendment suits in which plaintiffs can receive monetary damages from federal or state officials. Such defendants possess "qualified immunity" from suit; they may be held liable only if their conduct violated a statutory or constitutional right that was "clearly established" at the time of the violation.[67] By eliminating opportunities for judicial elaboration, the PLRA has stunted the establishment of clear constitutional standards.[68]

This effect is aptly illustrated by recent case law on the total isolation and understimulation found in supermax prisons and Security Housing Units (SHUs).[69] Although only one court has found supermax conditions unconstitutional as applied to all prisoners,[70] a line of

§ 3626(a)(1). Parties have several mechanisms by which they can seek termination of ongoing relief. *See id.* § 3626(b); *see also* Schlanger, *supra* note 62, at 590–92.

64 18 U.S.C. § 3626(c)(2).

65 *See* Woodford v. Ngo, 126 S. Ct. 2378, 2400 (2006) (Stevens, J., dissenting) ("[T]he number of civil rights suits filed by prisoners in federal court dropped from 41,679 in 1995 to 25,504 in 2000, and the rate of prisoner filing dropped even more dramatically during that period, from 37 prisoner suits per 1,000 inmates to 19 suits per 1,000 inmates."); Schlanger, *supra* note 19, at 1578–90.

66 *See* Schlanger, *supra* note 62, at 573–89. Judicial oversight of prisons may have been waning even before passage of the PLRA. *Compare* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 46 (1998) ("Since the late 1980s, the decline of momentum in prison conditions litigation has been abundantly evident."), *with* Schlanger, *supra* note 62, at 554 ("[A]t least as to correctional court orders, the claim that there was a decline in the reach of court-order regulation in the 1980s and 1990s is simply wrong.").

67 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

68 This effect may not be entirely to plaintiffs' detriment, as the two types of provisions likely militate in opposite directions. By eliminating weak claims before courts determine their merits, the provisions impeding filing may prevent courts from developing standards in cases with unsympathetic plaintiffs. This development is counterbalanced by the PLRA's preference for private settlement agreements over judicial oversight, which removes cases from the courts' purview when they are most likely to result in judicially enforced standards of mental health treatment.

69 *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd and remanded for further findings sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001), provides a vivid description of the effect of segregation on mentally ill inmates. *See id.* at 908–10; *see also* KUPERS, *supra* note 1, at 53–64 (describing SHUs and their effects on prisoners). *See generally* Peter Scharff Smith, *The Effect of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 471–500 (2006).

70 *See Ruiz*, 37 F. Supp. 2d at 861; *see also* Smith, *supra* note 69, at 444 ("There has been a 'general refusal of courts to find isolated confinement unconstitutional absent aggravating circum-

cases since 1995 has held that such confinement unconstitutionally risks serious harm to mentally ill inmates.[71] But despite this "increasingly clear judicial consensus that the Eighth Amendment is violated when the seriously mentally ill or developmentally disabled are held in supermax confinement,"[72] the lack of an unambiguous rule allows prison officials to win on qualified immunity.[73] One district judge described the relevant case law as "fuzzy" between 2000 and 2003,[74] even though she herself had concluded in 2001 that the conditions encountered by the plaintiff were likely unconstitutional.[75]

2. DOJ Investigations as an Entrenchment of Precedent. — Given the PLRA's throttling effect on already underelaborated judicial standards, plaintiffs' advocates might do well to look outside the courts for sources of clearly established law. DOJ investigations of jails and prisons under the Civil Rights of Institutionalized Persons Act[76] (CRIPA) could provide one such source of guidance. These investigations[77] consistently define a set of minimum constitutional standards for correctional mental health care and treatment of mentally ill inmates.[78] At times, the DOJ has even defined as "minimum remedial measures" such specific practices as "follow-up evaluations of [suicidal]

stances,' although specific conditions in specific facilities have been found to violate the Eighth Amendment." (citation omitted)).

71 *See, e.g.*, Jones'El v. Berge, 164 F. Supp. 2d 1096, 1116–17 (W.D. Wis. 2001); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995); *see also* David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 681 n.33 (2004) (collecting cases).

72 Fathi, *supra* note 71, at 681.

73 *See, e.g.*, Scarver v. Litscher, 371 F. Supp. 2d 986, 1003–05 (W.D. Wis. 2005), *aff'd on other grounds*, 434 F.3d 972 (7th Cir. 2006).

74 *See id.* at 1004.

75 *See Jones'El*, 164 F. Supp. 2d at 1117–21; *cf. Scarver*, 371 F. Supp. 2d at 1005 (noting that district court opinions "have no precedential weight").

76 42 U.S.C. §§ 1997–1997j (2000).

77 For a partial list of CRIPA investigations, complaints, and settlements, see DOJ Civil Rights Div., Special Litigation Section, Documents and Publications (Dec. 7, 2007), http://www.usdoj.gov/crt/split/findsettle.htm.

78 The DOJ requires that prisons have:

> (1) a systematic program for screening and evaluating inmates to identify those in need of mental health care; (2) a treatment program that involves more than segregation and close supervision of mentally ill inmates; (3) employment of a sufficient number of trained mental health professionals; (4) maintenance of accurate, complete and confidential mental health treatment records; (5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and (6) a basic program to identify, treat, and supervise inmates at risk for suicide.

Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Linda Lingle, Governor of Haw. 4 (Mar. 14, 2007), *available at* http://www.usdoj.gov/crt/split/documents/oahu_center_findlet_3-14-07.pdf (quoting Coleman v. Wilson, 912 F. Supp. 1282, 1298 n.10 (E.D. Cal. 1995)); *see also* Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Robert Dedman, Mayor of Lebanon, Tenn. 18–22 (Aug. 30, 2007), *available at* http://www.usdoj.gov/crt/split/documents/wilson_county_findlet_8-30-07.pdf; Doyle Letter, *supra* note 6, at 3–19.

new inmates within 14 days of intake,"[79] "15- and 30-minute checks of inmates under observation for risk of suicide,"[80] and no less than one "full-time master's level psychologist" and eight hours a week of psychiatric services for a jail population of 325.[81]

Although these investigations are rarely discussed in the literature, they could be taken as a significant interpretation of the floor required by the Eighth Amendment. The standards used by the DOJ are drawn from pre-PLRA case law,[82] but they have never been validated by an appellate court. Executive endorsement of these standards responds to a frequent concern of courts: that they are institutionally ill-suited to pass judgment on correctional systems.[83] To the extent that both deferential judges and Congress are leery of imposing judicially created requirements on prisons for reasons of institutional capacity, the measured opinions of the branch tasked with administrating federal prisons should provide assurance that such policies are both feasible and justified, thus making the CRIPA investigations as useful a source of precedent as the rare published opinions that they cite.

D. Conclusion

The PLRA was not meant to immunize the mistreatment of the mentally ill in prisons and jails, nor was it meant to disfavor mentally ill litigants in particular. Nevertheless, the Act has the potential to severely disadvantage their claims. Its most significant provisions, however, lend themselves to less disabling constructions, which courts should keep in mind when applying the PLRA.

[79] Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Ruth Ann Minner, Governor of Del. 16, 18 (Dec. 29, 2006), *available at* http://www.usdoj.gov/crt/split/documents/delaware_prisons_findlet_12-29-06.pdf.

[80] *Id.* at 18.

[81] Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to David Hudson, Judge, Sebastian County, Ark. 2, 15 (May 9, 2006), *available at* http://www.usdoj.gov/crt/split/documents/sebastian_findlet_5-9-06.pdf.

[82] The formulation commonly used by the DOJ was first set forth by the District Court for the Southern District of Texas in *Ruiz v. Estelle* in 1980. 503 F. Supp. 1265, 1339 (S.D. Tex 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982) (per curiam).

[83] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 827 (1974) ("Such considerations are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters."); Shook v. Bd. of County Comm'rs, No. 02-CV-00651-RPM, 2006 U.S. Dist. LEXIS 43882, at *33 (D. Colo. June 28, 2006) ("This court is not the appropriate decision maker to determine what constitutes 'adequate' training for Jail staff, or what medications should be on the Jail's list of approved medications, or how many employees are needed for 'sufficient' Jail staffing. This court must respect its constitutional boundaries").

V. THE SUPREME COURT'S PURSUIT OF PROCEDURAL MAXIMA OVER SUBSTANTIVE MINIMA IN MENTAL CAPACITY DETERMINATIONS

In the course of a mentally ill defendant's journey through the criminal justice process, there are three main instances in which the defendant's mental capacity comes into play: the element of mens rea, the insanity defense, and the determination of competency. Traditionally, these three concepts exist in distinct doctrinal boxes. They are analytically differentiated. Courts define them in different ways. And lawyers rarely, if ever, cite them together.

Nevertheless, the three are closely related. Insanity and competency are related to each other in time — they both concern a defendant's ability to understand the nature of his act or circumstances, but the inquiry into this understanding is made at different times for different purposes. This pair is related to mens rea in scope — instead of looking at a macro level situational understanding and awareness, the mens rea inquiry homes in on the moment of the causal act and asks about the actor's intentionality. Together, these three doctrines are paradigmatic instances of the courts assessing mental capacity. They provide the key doctrinal means by which mentally ill defendants escape punishment. And constitutional law bears on all three concepts.[1]

In the past few years, the U.S. Supreme Court has developed a renewed interest in these doctrines. This heightened attention has manifested itself through intense focus on procedural justice rather than on the contours of substantive regulation.[2] This preoccupation with procedures is misplaced. The Court should invoke both substantive and procedural frameworks, despite the difficulties that doing so entails, to ensure that the rights of mentally ill defendants are adequately protected.

[1] *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37 (1996) (mens rea); Leland v. Oregon, 343 U.S. 790 (1952) (insanity defense); Godinez v. Moran, 509 U.S. 389 (1993) (competencies to stand trial, plead guilty, and waive the right to counsel); Ford v. Wainwright, 477 U.S. 399 (1986) (competency to be executed).

[2] For definitions of "substantive" and "procedural" criminal law, see WILLIAM R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW (2d ed. 1986) § 1.1, at 2 ("The substantive criminal law . . . is mostly concerned with what act and mental state, together with what attendant circumstances or consequences, are necessary ingredients of the various crimes. Criminal procedure . . . is concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of punishment."). For a normative description of what distinguishes substance from procedure more generally, see Frank I. Michelman, Commentary, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577, 577 (1981) ("Substantive values are values deemed 'so important that they must be insulated from whatever inhibition the political process might impose, whereas a participational [or process goal is concerned] with how decisions effecting [substantive] value choices are made.'" (alterations in original) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 75 n.* (1980)).

A. The Three Instances of Capacity Defined

Mens rea ("guilty mind") is "[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime."[3] It is an "essential element[] of every crime at common law,"[4] and is thus a part of almost every criminal prosecution. The inquiry into mens rea is a much narrower inquiry than that into culpability as a whole. For example, a mentally ill defendant who perceives his attacker to be a bear and kills it, only to discover later that he killed a person, would lack the requisite mens rea for homicide (intent to kill a human being). By contrast, a mentally ill defendant who believes that God commanded him to kill the person would not have a mens rea defense (he still had intent to kill a human being) but might be excused for reasons of insanity.[5] It is a rare case when a defendant is found to have lacked the ability to form the requisite mens rea.[6]

The insanity defense is an "affirmative defense alleging that a mental disorder caused the accused to commit the crime."[7] The defense has a long history, from its roots in the common law,[8] to its transformation in *M'Naghten's Case*,[9] to its decline after *United States v. Hinckley*.[10] Today, the defense takes a number of forms in forty-six states,[11] and four states have abolished it altogether.[12] Findings of insanity are more common than findings of inadequate mens rea, but less common than findings of incompetency.

In contrast to the insanity defense, which focuses on the defendant's mental state at the time of the offense, competency determinations assess a defendant's "present insanity"[13] or present mental fit-

[3] BLACK'S LAW DICTIONARY 1006 (8th ed. 2004).

[4] *Id.*

[5] These examples are taken from Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221, 226–27 (1984).

[6] *See* United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987).

[7] BLACK'S LAW DICTIONARY 810 (8th ed. 2004) (defining "insanity defense").

[8] 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25.

[9] (1843) 8 Eng. Rep. 718 (H.L.) (setting forth the classical two-prong test).

[10] 525 F. Supp. 1342 (D.D.C. 1981), *clarified on denial of reconsideration*, 529 F. Supp. 520 (D.D.C. 1982), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982); *see* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 13–28 (2007).

[11] Those forms include various versions of cognitive incapacity, moral incapacity, volitional incapacity, and product-of-mental-illness tests. Clark v. Arizona, 126 S. Ct. 2709, 2720–22 (2006).

[12] Those four states are Idaho, Kansas, Montana, and Utah. Stephen M. LeBlanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1288–93 (2007).

[13] *E.g.*, Hopkins v. State, 429 So. 2d 1146, 1155 (Ala. Crim. App. 1983). Mens rea and insanity both concern the defendant's responsibility for the crime, whereas competency implicates the defendant's Fifth, Sixth, and Fourteenth Amendment rights to confrontation and a fair trial. *See* DONALD PAULL, FITNESS TO STAND TRIAL 8–9 (1993).

ness.[14] The idea of competency is also firmly rooted in common law tradition.[15] Competency determinations can take place at various phases of a prosecution, from arraignment to trial to execution, at the suggestion of either the defendant or the court. Findings of incompetency are by far the most common of the three mental capacity deficiencies.[16]

B. The Court's Proceduralism

The federal constitutional limits on the three doctrines just defined share an important characteristic: they are virtually all procedural. That proposition is clearer today than it was even a few years ago. Since 2003, the Supreme Court has taken more substantive criminal mental health law cases than it had averaged in each of the prior four decades.[17] Two of these recent cases — *Clark v. Arizona*[18] and *Panetti v. Quarterman*[19] — dealt with the capacity of mentally ill defendants.[20] Although both cases had the potential for significant substantive innovations, in each the Court more eagerly analyzed and engaged with the procedural issues of the case, passing on important opportunities to lay down even minimal substantive standards.

In *Clark*, the Court left unanswered the question whether the Constitution requires some minimum diminished capacity defense.[21] Faced with the issue of whether Arizona's *Mott*[22] rule — a rule that barred psychiatric testimony about a defendant's mental incapacity from being considered on the element of mens rea — violated due process, the Court could have approached the issue by focusing on "the substantive question of how states may define mens rea and defenses to it."[23] Indeed, this was the approach the Court had previously taken in *Montana v. Egelhoff*[24] when faced with a similar evidence channel-

[14] It should be noted that there are many people who may be incompetent but who are not mentally ill, and there are many people with mental illnesses who are perfectly competent.

[15] 4 BLACKSTONE, *supra* note 8, at *24–25.

[16] PAULL, *supra* note 13, at 5–6 (noting that one hundred defendants are found to be incompetent for every one found to be insane); *see also* United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987).

[17] Christopher Slobogin, *The Supreme Court's Recent Criminal Mental Health Cases*, CRIM. JUST., Fall 2007, at 8, 8.

[18] 126 S. Ct. 2709 (2006).

[19] 127 S. Ct. 2842 (2007).

[20] The third case, *Sell v. United States*, 539 U.S. 166 (2003), is discussed in Part II, *supra* pp. 1121–33, and the fourth case, *Atkins v. Virginia*, 536 U.S. 304 (2002), which deals with mental retardation, is outside the scope of this Development.

[21] A diminished capacity defense is essentially "a recognition that mental illness . . . can negate the requisite mens rea for the crime." Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1218 (2000).

[22] *See* State v. Mott, 931 P.2d 1046 (Ariz. 1997).

[23] *See* Slobogin, *supra* note 17, at 12.

[24] 518 U.S. 37 (1996).

ing question. In that case, the Court decided that the voluntary intoxication defense is not a fundamental principle of justice protected by the Due Process Clause, thus rendering evidence channeling unproblematic.[25] By contrast, in *Clark*, the Court wrangled with the matter as one involving evidentiary rules, and chose to comment upon the ability of states to channel testimony of mental illness toward the insanity defense and away from mens rea.[26] (This channeling question would be moot if the underlying substantive question — whether or not the Constitution requires a diminished capacity defense — were resolved.) Not only did the Court embark on this procedural tack from the outset, it went forth aggressively, contriving an elaborate (and arguably unnecessary[27]) construct to categorize the relevant evidence into three domains.[28] In all its procedural zeal, the Court failed to answer the underlying substantive question.

The *Clark* Court also avoided answering the question whether the Constitution requires states to maintain some minimum insanity defense. At issue in *Clark* was Arizona's formulation of the insanity defense, which asked only whether the defendant "was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong."[29] This formulation eliminated the traditional first prong of *M'Naghten*: that the defendant not know the nature and quality of his act.[30] In determining the constitutionality of the Arizona standard, the *Clark* majority went so far as to declare, "History shows no deference to *M'Naghten* that could elevate its formula to the level of [a] fundamental principle" that limits the states' ability to define crimes and defenses.[31] But the Court went no further, leaving open the question what sort of standard *does* constitute a fundamental principle limiting the states. To be sure, this sort of evasion is not the same as the evasion engaged in by the Court with respect to mens rea. The mens rea issue was squarely before the Court, whereas judicial minimalists might argue that the Court would have had to go out of its way to answer the question whether the Constitution requires the states to provide some minimum insanity defense. But this is true only if one assumes that the constitutional minimum does not lie somewhere between *M'Naghten* and the Arizona standard, which it very well may. Consider this example: a mentally ill man shoots a row of

[25] *Id.* at 51, 56 (plurality opinion).

[26] *See* Clark v. Arizona, 126 S. Ct. 2709, 2724–26, 2731–36 (2006).

[27] *Id.* at 2738 (Kennedy, J., dissenting).

[28] *Id.* at 2724–25 (majority opinion) (describing categories of "observation evidence," "mental-disease evidence," and "capacity evidence").

[29] *Id.* at 2719 (alteration in original) (quoting ARIZ. REV. STAT. ANN. § 13-502(a) (West Supp. 2005)).

[30] (1843) 8 Eng. Rep. 718, 722 (H.L.).

[31] *Clark*, 126 S. Ct. at 2719.

apples at a fruit stand. Only, the fruit stand is a hallucination, and he is really shooting into a group of people. The man does not know the nature of his act (that he is shooting people), but does know that what he is doing is wrong (it is destruction of property). Under the Arizona standard, this man would be considered sane for the purposes of a homicide prosecution. However, the factual scenario presents clear doubts about the man's culpability and the proportionality of his punishment — misgivings that might implicate the Eighth Amendment.

In *Panetti*, the Court left unanswered the question of the proper standard for competency to be executed. The Court, in large part, engaged with the procedural matters of the case: it interpreted restrictions on "second or successive" petitions for habeas corpus[32] as containing an exception for certain competency claims,[33] and it held unconstitutional the trial court's failure to provide the defendant with a hearing and an independent psychiatric evaluation upon a "substantial threshold showing of insanity."[34] The Court then issued what Justice Thomas termed "a half-baked holding"[35] on the substantive matter of the proper competency standard, asserting that an individual who "cannot reach a rational understanding of the reason for the execution" cannot be competent to be executed.[36] As for a controlling definition of the competency standard, the Court left this to the states, saying: "[W]e do not attempt to set down a rule governing all competency determinations."[37] To be sure, this step in the substantive direction deserves some recognition, considering the Court could have resolved the case on procedural grounds alone. However, since it was just a small step (merely letting states know what was unacceptable), it did little in the way of demarcating the limits of what might be acceptable.

In the end, in its consideration of the capacities of mentally ill defendants, the Court is most proceduralist in the most substantive areas. On mens rea and the insanity defense — concepts that define criminal liability — the Court hesitates to provide definitive substantive minima. On competency — an inquiry made during the litigation process — the Court nears substantive innovation but ultimately shies away.

[32] 28 U.S.C. § 2244(b) (2000).

[33] Panetti v. Quarterman, 127 S. Ct. 2842, 2852–54 (2007) (excepting competency claims made pursuant to *Ford v. Wainright*, 477 U.S. 399 (1985), that are filed as soon as they are ripe). *Ford* held that the Eighth Amendment "prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 410.

[34] *Panetti*, 127 S. Ct. at 2856–57 (quoting *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment)).

[35] *Id.* at 2873 (Thomas, J., dissenting). Justice Thomas chided the Court for undertaking the substantive inquiry in the first place. *See id.*

[36] *Id.* at 2861 (majority opinion).

[37] *Id.* at 2862.

C. The Problem with a Primarily Procedural Approach

Procedural jurisprudence alone cannot properly protect the rights of mentally ill defendants. Substantive and procedural values or goals are "strictly relative to one another."[38] Procedures only work if they act to enforce or ensure enforcement of some background norm. Even the most thorough procedural constructs employed by the Court are empty without strong substantive guides for states to follow.[39] For this reason, the Court should not shy away from greater substantive engagement, or else the rights themselves may be rendered meaningless.

Excessive focus on procedural solutions can have the effect of preventing alignment between the law and prevailing notions of justice. To be sure, procedure is important to perceptions of fairness and compliance with the law.[40] But a fair procedure, by itself, cannot guarantee public satisfaction with an ultimate outcome. Indeed, people are less concerned about process when outcomes implicate and threaten "moral mandates," like those concerning innocence and guilt.[41] No amount of evidentiary rules, avenues of appeal, and rounds of review can make a guilty verdict right if, in fact, the defendant is innocent. Errors will occur, in part because total accuracy is both unattainable and unaffordable in procedural systems,[42] and in part because some of the error lies beyond procedure — undetected and undetectable by procedural mechanisms and lurking within the background substantive norm to which those mechanisms are tethered. That is why, despite rigorous litigation and appeal, the outcome "must in the end be submitted to a moral scrutiny."[43] Scrutiny is particularly warranted with respect to jurisprudence in the realm of mental illness, where a lack of substantive regulation of state-led determinations results in outcomes that fall short of nationally accepted moral sensibilities.[44]

[38] Michelman, *supra* note 2, at 577.

[39] *See* Parratt v. Taylor, 451 U.S. 527, 545 (1981) (Blackmun, J., concurring) ("I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process."), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 7–19 (1996) (arguing that procedural rules need substantive limits to work).

[40] *See* TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 176 (1997) (noting that "people who experience procedural justice when they deal with authorities are more likely to view those authorities as legitimate, to accept their decisions, and to obey social rules").

[41] *See* Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RESEARCH 305, 315–16 (2001).

[42] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 185–86 (2004).

[43] H.L.A. HART, THE CONCEPT OF LAW 210 (2d ed. 1994).

[44] *See* Ford v. Wainwright, 477 U.S. 399, 409 (1986) ("[T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently

Procedural guidelines, unaccompanied by substantive ones, also create perverse incentives for states to formulate minimal substantive standards. State courts are, to a significant extent, motivated by a desire not to have their decisions overturned. In order to achieve this goal, lower courts implement weak substantive protections — standards that are narrowly defined and easily met — such that officials can easily comply with the procedural requirements set by the Court above. The phenomenon is well illustrated by guilty pleas. For a defendant to plead guilty, he must voluntarily, knowingly, and intelligently waive his right to trial.[45] This inquiry *should* delve into the mental and emotional health of the defendant,[46] and his ability to understand and assimilate to a set of legal warnings. Instead, in practice, the guilty plea colloquy consists of a series of "yes" or "no" questions.[47] Defendants often nod away their rights with the judge's goading and their lawyer's coaching.[48] Courts thus proceduralize a substantive inquiry: instead of actually evaluating the defendant's mental state, the standard requires only that officials jump through a few hoops. If anything, the procedure is a mask — it does not identify incompetency so much as hide it.

Indeed, this race to the bottom occurs even when the Court *does* set forth some substantive constitutional minimum. Consider the nature of lower court decisions interpreting *Ford v. Wainwright*[49] prior to *Panetti*. Justice Marshall's opinion in *Ford* banned execution of the incompetent, but declined to provide the relevant definition of competency.[50] Only Justice Powell, in a concurring opinion, provided some substantive guidance, arguing that the state should not execute offenders who "are unaware of the punishment they are about to suffer and why they are to suffer it."[51] Equipped with this substantive morsel, lower courts addressing the issue after *Ford* have applied and inter-

shared across this Nation."). *See generally* Lynnette S. Cobun, Note, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J.L. & MED. 471, 475, 478 (1984) ("[T]he insanity defense reflects society's moral judgment that certain persons, due to mental disability, have not inflicted the same harm upon society as have others who have committed the same offense. . . . [The defense] illustrate[s] society's willingness to consider mental illness in determining culpability").

45 *See* Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).

46 *Cf.* Michael Mello, *Executing the Mentally Ill: When Is Someone Sane Enough to Die?*, CRIM. JUST., Fall 2007, at 30, 30 (noting that mental illness is relevant to plea negotiations).

47 Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1463 (2005).

48 *See id.* at 1463–64.

49 477 U.S. 399.

50 *See id.* at 405–10; *id.* at 410–18 (plurality opinion).

51 *Id.* at 422 (Powell, J., concurring in part and concurring in the judgment).

preted Justice Powell's language very narrowly.[52] The same has happened with standards for competency generally. In *Godinez v. Moran*,[53] the Court held that the standards for competency to plead guilty and competency to waive the right to counsel are no higher than the standard for competency to stand trial.[54] In addition to reaching this holding, the Court mentioned that "[s]tates are free to adopt competency standards that are more elaborate than [this] formulation."[55] Despite this explicit allowance for — and perhaps encouragement of — trial court–level formulation of higher standards, lower courts have largely followed the Supreme Court's lead, parroting the minimum.[56] At least one state has interpreted *Godinez*'s seemingly permissive equivocation of standards as a ceiling, not a floor, describing the Court as having held that the standard for competency to waive counsel "*may not* be higher than" the standard for competency to stand trial.[57] This interpretation exemplifies why the Court not only must prescribe constitutional minima that are substantive, but also must ensure that those minima are meaningful constitutional floors.

D. Toward Increased Substantive Engagement

The Supreme Court should grapple with substantive standards and establish constitutional minima, not simply leave this task to the states. A substantive approach is preferable because it can better ensure an acceptable set of outcomes by addressing those outcomes directly;[58] that is, it can better ensure that people whose mental capacities make them undeserving of punishment do not receive punishments that they do not deserve. While there are a number of reasons why substantive lawmaking may prove difficult, the Court still should consider this approach.

[52] Slobogin, *supra* note 17, at 14. Examples of courts to have addressed the language are *Billiot v. State*, 655 So. 2d 1, 6 (Miss. 1995); and *Barnard v. Collins*, 13 F.3d 871, 876–77 (5th Cir. 1994).

[53] 509 U.S. 389 (1993).

[54] *Id.* at 391. The Court adopted a standard requiring that a defendant need only have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Id.* at 396 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)) (internal quotation marks omitted).

[55] *Id.* at 402.

[56] *See, e.g.*, Sims v. State, 438 S.E.2d 253, 254–55 (S.C. 1993).

[57] Edwards v. State, 854 N.E.2d 42, 48 (Ind. Ct. App. 2006) (emphasis added), *aff'd*, 866 N.E.2d 252 (Ind. 2007), *cert. granted*, 128 S. Ct. 741 (2007).

[58] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 412–26 (1995); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66–74 (1997).

Substantive standards can be hard to formulate because mental illness is difficult to define and categorize.[59] This difficulty may incline the Court to avoid them altogether. But substantive approximations are not *impossible* to formulate. The Court is in a position to create a functional and moral — if not purely scientific — definition.[60] This is precisely what the Court did in *Dusky v. United States*,[61] where it defined the test for competency to stand trial as "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him."[62] The *Dusky* test was formulated in functional terms. The Court might take a similar approach with other mental capacity doctrines.

Indeed, a number of administrable standards exist and have been proposed in the courts and in the literature.[63] These include a diminished capacity defense only for specific intent crimes,[64] an insanity defense that includes cognitive, moral, and volitional prongs,[65] and a competency to be executed standard that requires that the defendant understand the nature and purpose of the punishment and appreciate the reason for its application in his case.[66] To be sure, such definitions inevitably involve some arbitrary line drawing. But, as the Court's jurisprudence has already evidenced in other areas,[67] with some substantive matters, this risk is worth taking.[68]

[59] *See* Andrew E. Taslitz, *Mental Health and Criminal Justice: An Overview*, 22 CRIM. JUST., Fall 2007, at 4, 4.

[60] *See id.* ("[B]ecause 'normalcy' unquestionably involves moral and social judgments, no definitions of mental health or illness can be purely 'scientific' ones.").

[61] 362 U.S. 402 (1960) (per curiam).

[62] *Id.* at 402 (quoting the Solicitor General's brief) (internal quotation mark omitted).

[63] *See, e.g.*, Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 294 (1992) (advocating multifaceted evaluation of competence, including competence to assist counsel and decisional competence); Joshua Dressler, Commentary, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953 (1984) (arguing that diminished capacity, in the form of partial responsibility, should be recognized as a legitimate excuse); Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1 (1988) (advocating a volitional insanity defense as a constitutional floor).

[64] *E.g.*, State v. Holcomb, 643 S.W.2d 336, 341–42 (Tenn. Crim. App. 1982).

[65] *E.g.*, State v. Hartley, 565 P.2d 658, 660–61 (N.M. 1977).

[66] AM. BAR ASS'N, COMM'N ON MENTAL AND PHYSICAL DISABILITY LAW, REPORT NO. 122(A), Recommendation § 3(d) (2006), *available at* http://www.abanet.org/disability/docs/DP122A.pdf.

[67] The Court's categorical exclusion of juvenile defendants, Roper v. Simmons, 543 U.S. 551 (2005), and mentally retarded defendants, Atkins v. Virginia, 536 U.S. 304 (2002), from death penalty eligibility drew lines that may have a less-than-perfect correlation with culpability.

[68] *See* Steiker & Steiker, *supra* note 58, at 418 (noting that the risk of underinclusion incurred by arbitrary line-drawing is preferable to the risk of overinclusion — that is, the risk that criminal punishment will be imposed on the undeserving — when no lines are drawn).

Though courts can formulate substantive standards, such standards, once formulated, may prove difficult in their application. Psychiatric evidence is often tough to interpret, and courts tend to lack the institutional competence to make such determinations. Instead, their comparative advantage lies in judging the adequacy and design of procedural protections.[69] Courts' familiarity with procedural decisionmaking may explain why they prefer to analyze cases using procedural formulations rather than substantive ones. Nevertheless, courts can still forge ahead on the substantive front with the help of experts.[70] Indeed, this is the precise purpose of expert testimony.[71] To be sure, there are many instances in which even the experts disagree.[72] But such disagreement does not occur with great frequency[73] or consequence,[74] and to the extent that it does occur, it is somewhat inevitable.[75] If the courts were to surrender to this inevitability, they would undermine the entire well-established practice of using psychiatric expert testimony — a practice the Court has repeatedly endorsed.[76]

Even if the Court, through the use of expert testimony, is well-equipped to engage in substantive formulation, the principle of federalism would rightly give it pause. Substantive criminal law standards are traditionally the domain of the states,[77] and for good reason. In a world in which large majorities of people in one place find a particular behavior offensive and wrong, and large majorities of people in another place find that same behavior trivial or acceptable, or even good, the best way to maximize individuals' satisfaction with the laws they

[69] *See* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 565 (1991) (Kennedy, J., dissenting) (noting that courts have "expertise and some degree of inherent authority" in the area of "practice and procedure").

[70] Mental health professionals can assist courts, but ultimately it is the role of judges to balance the legal, moral, and social interests at stake. *Cf.* Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 371 (1992).

[71] *See* FED. R. EVID. 702 (allowing expert testimony only when it will "assist the trier of fact to understand the evidence"); Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 52 (1901) (noting that the role of an expert witness is to furnish "general propositions" that are outside of the common knowledge of the factfinder). Indeed, expert testimony is particularly valuable with respect to adjudications of mental states. *See generally* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS (2007).

[72] *See, e.g.*, Mello, *supra* note 46, at 32 (noting the varied diagnoses of the defendant in *Ford*).

[73] Park Elliott Dietz, *Why the Experts Disagree: Variations in the Psychiatric Evaluation of Criminal Insanity*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 85 (1985) (noting agreement in 92% of cases).

[74] Gerald E. Nora, *Prosecutor as "Nurse Ratched"?: Misusing Criminal Justice as Alternative Medicine*, CRIM. JUST., Fall 2007, at 18, 20 (noting that the "[mental] illnesses that are most relevant to public safety and criminal justice" are "subject to objective diagnoses").

[75] *See* Dietz, *supra* note 73, at 86.

[76] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 896 (1983).

[77] *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995).

live under is to devolve decisionmaking to the local level.[78] Federal guidance that is merely procedural is more respectful of state-level substantive standards than federal substantive mandates to the states. But all behaviors do not fit under this rubric. In fact, the federal system has already incorporated at least some areas of criminal law into its own domain.[79] Mental capacity determinations should be next.[80]

Mentally ill defendants cannot rely on local democracy to enforce the proper moral outcome or to protect them. For there is a political process problem[81]: mentally ill defendants systematically lack access to local legislatures that could advocate for their interests.[82] And given that most state judges are elected, they too are too vulnerable to majoritarian pressures to protect the insular rights at issue. These factors justify the Court's stepping in[83]:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.[84]

Given the perversities of pure proceduralism in this area, the Court can only fully perform its role as buffer against majoritarian politics if

[78] *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492–1511 (1987) (book review) (explaining how federalism "secure[s] the public good," "protect[s] private rights," and "preserve[s] the spirit and form of popular government" (quoting THE FEDERALIST NO. 10 (James Madison)) (internal quotation marks omitted)).

[79] *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 403–06 (1998) (noting that traditionally state-based American criminal law is subject to international treaty-making and related federal regulation). Criminal trial rules and procedures are also a traditional domain of the states, Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973), but the Court has federalized that arena nevertheless, *see* Stuntz, *supra* note 58, at 16–19.

[80] Even staunch advocates of federalism acknowledge the need for exceptions. Federalism's ends of diversity and creative energy must be balanced against the goal of "achiev[ing] a unity sufficient to resist [a people's] common perils and advance their common welfare." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). Protection of the mentally ill fits into this caveat, given that prosecution and execution of mentally ill defendants are unacceptable as a moral matter.

[81] ELY, *supra* note 2, at 135. The political process argument applies as forcefully to substantive protections as to procedural ones. *See* Stuntz, *supra* note 39, at 21.

[82] *See* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 843 (1998) (noting that the mentally ill "have no political action committee or access to legislators or governors"); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 269 (1987) (noting that the mentally ill lack "effective direct access to decisionmaking processes" and that "it is likely that their interests will not routinely be of much importance to those who do have access").

[83] *See* Alan M. Dershowitz, *John Hart Ely: Constitutional Scholar (A Skeptic's Perspective on Original Intent as Reinforced by the Writings of John Hart Ely)*, 40 STAN. L. REV. 360, 369 (1988).

[84] McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

it agrees to engage in meaningful substantive analysis of the issues that affect mentally ill defendants.

E. Conclusion

The judicial values of minimalism and restraint undoubtedly suggest that, even given the benefits of judicial engagement in the substantive arena, the Court should proceed cautiously into this area.[85] But it is a mistake to assume that proceduralism is the most minimalist route. The reality of the Court's procedural jurisprudence suggests otherwise. In the realm of criminal procedure, the Court has meddled in the minutiae of even day-to-day investigative activities. With each decision, the Court defines the required processes in ever more detail.[86] A substantive turn in this area might in fact enable less activism in Supreme Court decisionmaking on the whole.

Moreover, substantive regulation of mental capacity determinations readily finds a place within the Constitution's provisions. To be sure, due process does say "process," and most of the Bill of Rights' provisions pertain only to process,[87] so, at first glance, it may appear difficult to give such regulation a constitutional home. Nevertheless, there are several plausible options. These include the Eighth Amendment's bar against cruel and unusual punishment,[88] an Eighth Amendment proportionality principle,[89] and Fourteenth Amendment substantive due process as applied to criminal law.[90]

Whichever path it chooses, the Court need not define the ultimate, optimal doctrine — it need only define a meaningful substantive floor. Only such an approach both respects state power and protects those whose voices are drowned out by the majoritarian chorus.

[85] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[86] *See* Stuntz, *supra* note 58, at 16–19 & nn.61–69.

[87] *See* Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

[88] *See generally* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966). In this vein, the Court's stance in *Robinson v. California*, 370 U.S. 660 (1962), provides an apposite starting point. *But see* Powell v. Texas, 392 U.S. 514, 532–33 (1968) (distinguishing *Robinson* and limiting its logic). At the very least, *Robinson* provides precedent for the Court's limiting the government's penal powers by assessing the constitutionality of the definition of the crime, not simply the length of the punishment. *See Robinson*, 370 U.S. at 667.

[89] *See, e.g.*, Steiker & Steiker, *supra* note 58, at 415; Stuntz, *supra* note 58, at 72; *see also* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 600–06 (2005).

[90] *See* Stuntz, *supra* note 58, at 68. *See generally* Herbert L. Packer, The Aims of the Criminal Law *Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971).

VI. MENTAL HEALTH COURTS AND THE TREND TOWARD A REHABILITATIVE JUSTICE SYSTEM

In the last decade, diversionary programs known as mental health courts (MHCs) have been created all over the country. These programs work at the local level to divert mentally ill chronic reoffenders away from the traditional criminal justice system and into treatment. As MHCs become more widespread and their effectiveness becomes broadly recognized, their sources of support and funding have grown. Recently, MHCs have been increasingly promoted (and funded) by the U.S. Department of Justice as part of a bipartisan effort jointly sponsored by the President and Congress to increase access to mental health services.[1] No longer simply a few scattered programs, MHCs have now become a national project providing mentally ill individuals a way out of repeated imprisonment.

Because of their unconventional nature, MHCs may also prove to be a window into the evolution of America's criminal justice system. Historically, the prevailing theory of punishment has moved from rehabilitation to retribution and back again.[2] Since the mid-1970s, retribution has been the norm. Along with it have come overflowing prisons and an incarceration level higher than that of nearly all other developed countries.[3] The recent popularity, success, and widespread acceptance of MHCs (and other problem-solving courts[4]), with their focus on treatment and probation instead of incarceration and punishment, indicate that an important step has been taken toward a more rehabilitation-focused justice system as a whole.

Section A chronicles the rise of the MHC system and provides an overview of MHC mechanics. This section also discusses the social and fiscal costs and benefits of MHCs, as well as the effect of federal funding on the development of MHCs. Section B examines historical theories of punishment — particularly the divide between retributive

[1] In 2000, Congress enacted the America's Law Enforcement and Mental Health Project (ALEMHP) Act, Pub. L. No. 106-515, 114 Stat. 2399 (codified at 42 U.S.C. §§ 3796ii to 3796ii-7 (2000)). The ALEMHP Act would have created up to 100 new MHCs by 2004. However, funding was not immediately appropriated. Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 457, 457 (2001). Little progress was made on federal funding until President George W. Bush's 2003 New Freedom Commission, discussed *infra* pp. 1173–74.

[2] *See infra* pp. 1174–75.

[3] JUSTICE KENNEDY COMM'N, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 4 (2004) [hereinafter KENNEDY COMM'N], *available at* http://www.abanet.org/media/kencomm/rep121a.pdf.

[4] Problem-solving courts, the group of courts to which MHCs belong, are criminal judicial proceedings that attempt to address defendants' actions at a causal level by imposing remedial discipline rather than retributive punishment. Such courts include drug courts, domestic violence courts, MHCs, and others. *See* Bruce Winick & David Wexler, *Introduction* to JUDGING IN A THERAPEUTIC KEY 3–5 (Bruce Winick & David Wexler eds., 2003).

and rehabilitative theories — and how they have affected the development of MHCs. Section C analyzes the current state of the retributive-rehabilitative divide, concluding that MHCs may provide a useful insight into the future direction of the criminal justice system as a whole.

A. Mental Health Courts: An Overview

America's court system has long struggled with the question of how to provide justice for mentally ill defendants. Are they to be treated like the rest of the population, tried, convicted, and confined without regard to their mental status? Or does their mental illness place them in a separate category? Are they more treatable than their "normal" fellow inmates — is their recidivism more preventable? One MHC-sponsoring judge states, "We've learned that [mentally ill] offenders do not do well in prison. . . . [T]heir illnesses just get worse. And what happens when they are released without having received effective treatment? They get recycled right back into the system. Everyone loses."[5] Mentally ill defendants whose offenses are linked to their conditions are unlikely to receive treatment in prison, and very likely to reoffend quickly after their sentences are over.[6] This situation presents a challenge to judges, prosecutors, and legislators alike: if there is a treatable mental condition at the root of a series of recidivist offenses, does the criminal justice system have the right, or perhaps the responsibility, to attempt to intervene at that root level?

In the last ten years, a new type of court has arisen to take on this challenge: the mental health court. Combining aspects of adversarial courts and other diversionary programs under the supervision of criminal court judges, MHCs actively seek out and divert from the normal criminal process repeat offenders whose offenses are linked to mental illness. Flagged for the program by the arresting officer, defense counsel, the judge, or even the prosecution, these individuals' cases are adjudicated in an MHC in hopes of granting offenders a way out of the cycle of recidivism. When identified as possible candidates for an MHC, defendants are given psychiatric evaluations and, if di-

[5] Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813, 826 (2007).

[6] By some estimates, 16% of inmates in prisons nationwide are mentally ill. Only 17% of these inmates receive any sort of treatment during their incarceration, which leaves thousands of untreated individuals, their diseases possibly worsened by their jail experience, to be released onto the streets — and often rearrested within months. *See* DEREK DENCKLA & GREG BERMAN, CTR. FOR CT. INNOVATION, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 3–4 (2003), *available at* http://www.courtinnovation.org/_uploads/documents/rethinkingtherevolvingdoor.pdf. Forty-nine percent of mentally ill inmates have three or more prior arrests, as opposed to only 28% of non–mentally ill inmates. *Id.* at 4.

agnosed with a mental illness that contributed to their offense, are offered "long-term treatment as an alternative to incarceration."[7]

1. The Rise of the Mental Health Court. — Since 1997, when the first MIIC was set up in Broward County, Florida, MIICs have rapidly increased in number and size. Founded in order to "focus mental health services and resources on defendants whose mental illness was the primary reason for their recidivism," early MIICs accepted primarily inmates who had repeatedly committed misdemeanors.[8] In 1999, Anchorage, Alaska, set up a court to divert its own mentally ill recidivists.[9] By 2005, some 125 MIICs had been established in states across the nation.[10]

MIICs typically have dedicated personnel, including a judge, a prosecutor, and a public defender, each of whose entire docket consists of MIIC participants.[11] Also present are various mental health professionals whose primary responsibility is their designated MIIC. All personnel in an MIIC, from judge to case worker, are thoroughly trained in mental illness and its treatment, as well as in the psychology underlying criminal behavior of the mentally ill. Because the administrative personnel of an MIIC are so stable, the court takes on a unique

[7] Lippman, *supra* note 5, at 826. Some defense practitioners and advocates for the mentally ill have questioned whether MHCs and other forms of problem-solving courts are truly voluntary. A choice between jail and treatment, they say, is no choice at all. Furthermore, because a defendant must often plead guilty to the underlying offense in order to participate in some MHCs, some defense attorneys have expressed ethical and professional reservations at the dual role they must play — they must defend, but also must inform their client that the only way to obtain potentially life-saving mental health services is to surrender without a fight. For a detailed exchange on the problem of voluntariness and the dilemmas of the defense attorney in problem-solving courts, see David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005); and Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable To Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007).

[8] Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 24–25 (2006).

[9] University of Alaska Anchorage Justice Ctr.: Mental Health Courts (2002) [hereinafter Anchorage MHCs], http://justice.uaa.alaska.edu/rlinks/courts/mentalhealth.html.

[10] *See* COUNCIL OF STATE GOV'TS, MENTAL HEALTH COURTS: A NATIONAL SNAPSHOT (2005) [hereinafter NAT'L SNAPSHOT], http://www.consensusproject.org/mhcp/national-snapshot.pdf.

[11] The stability of these three individuals is important because many legal professionals will have little or no background in psychology. Stability keeps training costs down and allows court personnel to reap the benefits of consistent and broad exposure to the mentally ill and their various symptoms and needs. *See* DENCKLA & BERMAN, *supra* note 6, at 15–16 (comparing the roles of traditional and problem-solving judges).

character[12] as a place where therapy can actually *begin*, not merely be prescribed.[13]

The relationship between MHCs and standard criminal courts is similar across jurisdictions, but can differ in the details. MIICs, like standard courts, derive their coercive power from the authority of the judge. Though MIICs vary in their use of jail as a sanction for noncompliance with the therapeutic requirements,[14] they all have in common the goal of transitioning the mentally ill defendants out of the prison system and into a treatment-oriented probationary period. MIICs vary as to whether they accept individuals who have already been convicted of or charged with a crime or those who have merely been arrested.[15] Regardless, nearly all MIICs use the promise of a cleared criminal record as an incentive for treatment compliance.[16] During their enrollment in an MIIC, individuals receive outpatient treatment at local clinics, have regular meetings with court or probation officers, make appearances in court to confer with the judge over their treatment progress, and participate in group counseling programs. Though the initial MIIC proceeding is usually still formulated as an adversarial process, it is certainly less so than a typical criminal court proceeding, and a defendant's subsequent court appearances often bear a strong resemblance to therapeutic appointments.[17]

2. The Expansion of the MIIC System. — The types of defendants accepted by MIICs have evolved over the decade since the Broward County court was founded. Early MIICs refused to accept defendants charged with felonies, preferring instead to focus their efforts on misdemeanants who committed "quality of life crimes."[18] No violent

[12] One unique aspect is the cooperation between the defense attorney and prosecutor — as one scholar puts it, "the attorneys for both sides work on the same team and share information." Stacey M. Faraci, *Slip Slidin' Away? Will Our Nation's Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIPIAC L. REV. 811, 825 (2004).

[13] *See, e.g.*, LISA CONTOS SHOAF, OHIO OFFICE OF CRIMINAL JUSTICE SERVS., A CASE STUDY OF THE AKRON MENTAL HEALTH COURT 3 (2004), http://www.ocjs.ohio.gov/research/Akron%20MHC%20case%20study.pdf (describing the atmosphere of the Akron, Ohio, MHC as "less adversarial and more relaxed than what is seen in a traditional court session"). For a practical example of how this atmosphere is created, see Eliza Strickland, *Breaking the Cycle*, SFWEEKLY.COM, Aug. 8, 2007, http://www.sfweekly.com/2007-08-08/news/breaking-the-cycle (describing a typical day in a California MHC).

[14] *See, e.g.*, DENCKLA & BERMAN, *supra* note 6, at 13.

[15] *See* Meekins, *supra* note 8, at 16–17.

[16] *See* Faraci, *supra* note 12, at 829–30.

[17] For a thorough discussion on MHCs and their inner workings, see generally GREG BERMAN & JOHN FEINBLATT, CTR. FOR CT. INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF PRIMER (2001) [hereinafter BRIEF PRIMER], *available at* http://www.courtinnovation.org/pdf/prob_solv_courts.pdf.

[18] Meekins, *supra* note 8, at 25. Such crimes include public urination, disruptive or verbally assaultive behavior, and the like.

criminals or sexual offenders were permitted into the programs,[19] although this restriction has changed in the last few years as MHCs have become more willing to accept individuals charged with minor felonies.[20] One of the natural concerns in a society contemplating the creation of an MIIC is the safety of the surrounding population, as such courts frequently release into the community individuals who would likely otherwise have been incarcerated. However, participants in MIICs often have much lower rates of reoffense while on probation than do mentally ill individuals with similar backgrounds who are sentenced to jail or prison.[21]

MIICs, as might be expected, are highly treatment-oriented. Many of their entrance criteria deal, either directly or indirectly, with treatability, as do their retention criteria and their requirements for "graduating" the program.[22] This treatment focus has led to some interesting effects — the courtroom becomes less of a place where impersonal justice is given, and more like a group therapy room.[23] Treatment may be emphasized to the exclusion of all else: at times, even the "stick" of a potential jail sentence for noncompliance with treatment and probation requirements is off limits to the MIIC because of the contrary effects that a stint in jail might have on a participant.[24]

3. The Long-Term Benefits of MIICs Outweigh Their Startup Costs. — Because MIICs require the active, dedicated participation of many trained professionals, administrative costs can mount quickly. Judges and prosecutors are often in short supply already;[25] public defender offices are busy and understaffed; mental health professionals are expensive. Some cities have been forced to cut back or eliminate their problem-solving courts because of their high cost. Other states and municipalities have begun imposing blanket fines on participation in their criminal justice systems — Illinois, for example, includes a uniform ten dollar "mental health court charge" in its court costs.[26] Nevertheless, counties acting on their own are often hard-pressed to pro-

[19] Faraci, *supra* note 12, at 826.

[20] *See* NAT'L SNAPSHOT, *supra* note 10.

[21] *See infra* p. 1173.

[22] *See* HENRY J. STEADMAN & ALLISON D. REDLICH, NAT'L INST. OF JUSTICE, AN EVALUATION OF THE BUREAU OF JUSTICE ASSISTANCE MENTAL HEALTH COURT INITIATIVE 14–15 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/213136.pdf.

[23] *See id.* at 15–16; *see also* Strickland, *supra* note 13 (describing participation in MHCs as a group-oriented therapeutic endeavor).

[24] *See* Meekins, *supra* note 8, at 25.

[25] *See In re* Certification of Need for Additional Judges, 842 So. 2d 100, 103 (Fla. 2003) (per curiam) ("Existing judicial resources are strained by . . . the creation and expansion of *effective, but labor-intensive*, specialized case processing techniques (e.g., juvenile and adult drug courts, mental health courts, elder courts, and domestic violence courts)." (emphasis added)).

[26] *See* People v. Price, 873 N.E.2d 453, 468–69 (Ill. App. Ct. 2007) (upholding the constitutionality of a $10 "fee" upon criminal conviction, even for nonparticipants in MHCs).

vide what has become an important part of their efforts at crime reduction and quality of life improvement.

Though the cost of starting an MHC is daunting, the potential social payout may be very high. In one drug court, recidivism has been reduced by over 40%, and employment rates exceed 90%.[27] Early data indicate that MIICs may similarly improve outcomes.[28] A study of one MIIC program indicates that, within twelve months, MIIC graduates are over 75% less likely to reoffend. Those graduates who do reoffend are almost 88% less likely to do so in a violent manner.[29] Another court saw its recidivism rates drop from 78% to 16%.[30] Of course, once a court is successfully established, reduced recidivism has its own financial rewards, not the least of which is an influx of stable, working individuals to a locality's tax base.[31]

In the first years of the MIIC experiment, the initial startup costs were so high that they may have prevented rural communities, often poor, from starting an MIIC.[32] The impact of high startup costs has dwindled with President George W. Bush's establishment of the New Freedom Commission on Mental Health.[33] The order established an investigative Commission "to conduct a comprehensive study of the United States mental health service delivery system, including public and private sector providers, and to advise the President on methods of improving the system."[34] The study was completed a year later.[35]

[27] *See* KENNEDY COMM'N, *supra* note 3, at 33.

[28] Because MHCs are so new, there has not been enough time to conduct a thorough, system-wide analysis of their effectiveness. However, some MHCs have conducted internal efficacy studies, many of which are catalogued at BJA Ctr. for Program Evaluation: Mental Health Courts, http://www.ojp.usdoj.gov/BJA/evaluation/psi_courts/mh6.htm (last visited Jan. 12, 2008). MHCs receiving DOJ money are required to collect statistics on the results of their programs, thus providing at least a minimal source of information. For an example of such a report, see SHOAF, *supra* note 13, at 1 (noting partial sponsorship of Akron MHC study by the DOJ Bureau of Justice Statistics).

[29] JOHN R. NEISWENDER, EXECUTIVE SUMMARY OF EVALUATION OF OUTCOMES FOR KING COUNTY MENTAL HEALTH COURT 4 (2004), *available at* http://www.metrokc.gov/KCDC/mhcsum32.pdf.

[30] KELLY O'KEEFE, CTR. FOR CT. INNOVATION, THE BROOKLYN MENTAL HEALTH COURT EVALUATION 53 (2006) [hereinafter BROOKLYN EVALUATION], http://www.courtinnovation.org/_uploads/documents/BMHCevaluation.pdf.

[31] DENCKLA & BERMAN, *supra* note 6, at 11 (noting that one established MHC had, with only 56 graduates, saved its locality nearly $400,000). Of course, as another commentator wryly noted, a "carrot-and-stick approach has successfully motivated thousands of offenders to get clean and lead productive (*and tax-paying*) lives." GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 9 (2005) (emphasis added).

[32] One-fourth of MHC-employing communities are rural. *See* NAT'L SNAPSHOT, *supra* note 10.

[33] Exec. Order No. 13,263, 3 C.F.R. 233 (2003) (superseded 2003).

[34] *Id.* § 3, 3 C.F.R. at 233.

[35] PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA (2003) [hereinafter NEW

With the encouraging recognition that "recovery from mental illness is now a real possibility,"[36] the Commission recommended an increase in federal funding to mental health facilities, and in particular to facilities dealing with mental illness in the criminal justice system.[37]

In 2004, Congress responded to the Commission's findings by reviving and passing bills to create and fund MIIC programs.[38] The Department of Justice (DOJ), which administers the grant program, has taken up Congress's call with enthusiasm, and now has an active sponsorship program.[39] Since the inception of DOJ sponsorship the number of MIICs has grown steadily, from 70 in January 2004 to over 125 in December 2005.[40]

As federal funding to MIICs has increased, the national judicial and legislative support for these courts has become more apparent. Though they started as local initiatives and are still conducted at the local level (the federal government does not yet have a problem-solving court program), MIICs are gaining a national character as well. The use of federal tax dollars to provide startup money to MIICs, situated as these appropriations are within the increasing nationwide use of problem-solving courts, may indicate the country's willingness to accept a shift of focus from a punishment model of justice to a rehabilitative model.

B. The Criminal Justice System: Retribution or Rehabilitation?

The difference between the new theory of problem-solving courts and the jurisprudence of punishment that has dominated the criminal justice system during the last twenty-five years is striking. Throughout American history, the purpose of punishment has been a source of great debate. The pendulum of criminal theory has swung between the poles of retribution and rehabilitation for longer than America has been a nation.[41]

FREEDOM COMM'N], *available at* http://www.mentalhealthcommission.gov/reports/FinalReport/downloads/FinalReport.pdf.

[36] *Id.* at 1. The Commission "recommend[ed] a fundamental transformation of the Nation's approach to mental health care . . . ensur[ing] that mental health services . . . actively facilitate recovery, and build resilience to face life's challenges." *Id.*

[37] *Id.* at 43–44.

[38] In 2004, Congress appropriated funding for the ALEMHP Act and also passed the Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327 (codified at 42 U.S.C. § 3797aa (Supp. IV 2004)).

[39] For further information on the DOJ sponsorship program, see Bureau of Justice Assistance Programs: Mental Health Courts, http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html (last visited Jan. 12, 2008).

[40] NAT'L SNAPSHOT, *supra* note 10.

[41] *See, e.g.*, Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 341 (1998) ("[T]he early penitentiary was founded on the hope of moral reform In contrast, [in] today's prison[s] . . . moral decay is more likely than moral reform."); Melvin Gutterman, *Prison Objec-*

By the middle of the twentieth century, theories of rehabilitation were the norm. Prisons were a place where treatment could be obtained, education could be had, and — hopefully — the groundwork for a normal life could be laid.[42] In the last few decades, however, the focus of the criminal justice system has swung with a vengeance toward a more standardized, punitive vision of punishment.[43] By the time the Sentencing Reform Act established the Federal Sentencing Guidelines in 1984, "the previously dominant rehabilitative ideal in criminal law had been called into question and replaced by a just desert theory of punishment."[44] Rehabilitation fell by the wayside, and with the introduction of mandatory minimums and high statutory maximums the "lock 'em up and throw away the key" perspective became the norm.[45]

Despite the general shift toward a more punitive theory of punishment, one academic theory continues to espouse rehabilitation and community-based remedies: Therapeutic Jurisprudence (TJ). TJ was developed by Professors Bruce Winick and David Wexler in the early 1980s in response to what they perceived as a harmful drift of the criminal justice system toward longer, harsher sentences and away from the rehabilitation of offenders. The basic assumption of TJ is that the purpose of the criminal justice system is treatment.[46] Thus, TJ theorists focus on incarceration's effect on defendants' mental and physical status. They consider "emotions, empathy, healing, and the psychological well-being of individuals" to be an important emphasis of the criminal justice system, a focus that leads naturally to a problem-solving approach.[47] Although TJ has never been a dominant theory in legal academia, the principles it espouses have become more accepted as problem-solving courts have risen in prominence. With the advent of problem-solving courts, TJ has found its place as the idea upon which drug courts, MHCs, and other such courts were struc-

tives and Human Dignity: Reaching a Mutual Accommodation, 1992 BYU L. REV. 857, 860–72 (1993) (providing detailed history of the development of the American prison system and chronicling its repeated swings from rehabilitation to harsh punishment and back again).

[42] *See* Gutterman, *supra* note 41.

[43] *See generally* Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. REV. 1345 (2004) (depicting the retributionist nature of the modern criminal justice system).

[44] James L. Nolan, Jr., Commentary, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1548 (2003).

[45] The United States now incarcerates over two million of its inhabitants, or approximately 1 in every 143 persons. In contrast, England, Italy, France, and Germany have rates of approximately 1 in every 1000. *See* KENNEDY COMM'N, *supra* note 3, at 4; *see also* Jennifer Gonnerman, *Two Million and Counting*, VILLAGE VOICE, Feb. 29, 2000, at 56 (noting that "the U.S. has 5 percent of the world's population . . . [but] 25 percent of its prisoners").

[46] Meekins, *supra* note 8, at 15.

[47] *See* Nolan, *supra* note 44, at 1546.

tured.[48] As such, the academic theories underlying TJ are now codified in the criminal justice systems of cities and towns nationwide.[49]

C. *Mental Health Courts: The Herald of a Fundamental Shift in the Criminal Justice System?*

The recent growth of MHCs is illustrative of a broader trend — or, perhaps, the reversal of a trend. In a 2003 speech to the American Bar Association (ABA), Justice Kennedy issued a charge to legal practitioners not to forget that the criminal justice system is more than "the process for determining guilt or innocence."[50] Instead, "[a]s a profession, and as a people, [lawyers] should know what happens after the prisoner is taken away."[51] He went on to note that, though "[p]revention and incapacitation are often legitimate goals," it is nevertheless important "to bridge the gap between proper skepticism about rehabilitation on the one hand and the improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach."[52] An ABA committee undertook this charge and presented its recommendations in a 2004 report urging the bar to adopt a greater emphasis on rehabilitation in sentencing.[53] The ABA report did not specifically focus on the situation of mentally ill defendants; its target was general rehabilitation for all offenders for whom such rehabilitation would be effective.[54] This report gave rise to the ABA Commission on Effective Criminal Sanctions, testimony before various state legislatures, and national conferences geared toward developing a more reentry-focused criminal justice system.[55]

Given the positions of such influential legal actors as Justice Kennedy, the ABA, and the scholars and judges cited in this and other pieces, a growing shift in the American criminal justice system is evident — a swing of the pendulum back toward rehabilitation and away from retribution. From an unquestionably retributive system that re-

[48] *See id.* at 1545–46; *see also* Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (noting drug courts' reliance on TJ principles).

[49] *But cf.* Samuel J. Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 461 (2007) (chastising mental health professionals for having "bought into" TJ).

[50] KENNEDY COMM'N, *supra* note 3, at 3.

[51] *Id.*

[52] *Id.* at 5–6.

[53] *Id.* at 24, 32–33.

[54] *See id.* at 9.

[55] *See generally* Criminal Justice Section: ABA Comm'n on Effective Criminal Sanctions (2007), http://www.abanet.org/dch/committee.cfm?com=CR209800 (cataloguing the many new ABA committees and working groups on criminal punishment).

lies upon mandatory minimums and restriction of judicial discretion, jail diversion programs and reduced sentences are emerging.[56] Though the dominant retributive regime is clearly still strong,[57] these rehabilitative innovations mark a notable and growing counterpoint.

Even the language of MIICs is fundamentally different from the rhetoric of standard retributive and incapacitative imprisonment justifications. For example, the Anchorage court was set up "to *address the needs* of mentally disabled misdemeanants."[58] The Brooklyn court exists to "link[] defendants with serious and persistent mental illnesses . . . to long-term treatment as an alternative to incarceration."[59] The federal impetus for expanding the MIIC system came from the New Freedom Commission's finding that "[r]elevant Federal programs . . . must . . . better align their programs to *meet the needs* of adults and children with mental illnesses."[60] An individual involved in an MIIC is not a defendant, but a "client" or a "court customer."[61] A problem-solving court judge describes his job not as "imposing punishment but as providing help."[62] In these and other ways, the criminal justice system, through its problem-solving courts, has incorporated the language of psychology — and, quite possibly, its therapeutic goals as well.

MIICs' emphasis on defendant rehabilitation has not been without criticism, both from rights advocates and from scholars. The intimate involvement that MIIC judges and prosecutors have with defendants, and the coercive power of the choice between an MIIC proceeding and a full trial that might lead to prison, have raised fears about MIICs' neutrality, detachment, and fairness, as well as concerns about due process and individual autonomy.[63] One commentator, concerned that "judicial activists" were using their "new position and influence in government . . . [to] become increasingly powerful social engineers,"

[56] JON WOOL & DON STEMEN, VERA INST. OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003, at 1 (2004), http://www.vera.org/publication_pdf/226_431.pdf ("[In 2003,] more than 25 states took steps to lessen sentences and otherwise modify sentencing and corrections policy."). Though the Vera Institute attributes this trend at least in part to concerns about the expense of incarceration, it is likely that the trend also has something to do with rehabilitative justice concerns.

[57] For example, California, which is known for its massive prison population and harsh three-strikes law, also has some of the best-functioning MHCs and other problem-solving courts in the country. This correlation may indicate a difficult internal conflict, as the instinct to punish harshly coexists with the instinct to divert those seen as having less culpability for their actions.

[58] Anchorage MHCs, *supra* note 9 (emphasis added).

[59] Lippman, *supra* note 5, at 826.

[60] NEW FREEDOM COMM'N, *supra* note 35, at 37 (emphasis added).

[61] *See, e.g.*, Randal B. Fritzler, *Ten Key Components of a Criminal Mental Health Court*, *in* JUDGING IN A THERAPEUTIC KEY, *supra* note 4, at 118, 118.

[62] Nolan, *supra* note 44, at 1556 (internal quotation marks omitted).

[63] *See supra* note 7; *see also* BRIEF PRIMER, *supra* note 17, at 10–15.

expresses worry that therapeutic courts open the door to judicial "manipulat[ion]," bringing about social change at the expense of individual rights.[64] Another notes that, because of their arguably less rigorous due process safeguards, MIICs risk "de-legitimiz[ing] the justice system" by undermining the protections present in a traditional court.[65]

The questions raised by advocates for the mentally ill and for criminal defendants are extremely important, and will likely structure this debate for years to come. Nevertheless, even in the early stages of the MIIC movement, these questions seem to be finding answers. Perhaps most importantly, graduates of MIIC programs nationwide have reported their satisfaction with the fairness of the process.[66] The reduction in recidivism rates reported in early studies,[67] an empirical indication that MIICs positively affect their clients' lives, is also telling of MIICs' legitimacy. Thus, despite the potential pitfalls of MIICs, their initial success seems to indicate that the benefits will justify the risks — especially if proper care is taken to ensure that a concern for defendants' rights and well-being remains at the fore.

Furthermore, if society is truly reentering an era of rehabilitative justice, MIICs and other problem-solving courts may only be the beginning. As medical and psychological knowledge progress, the "treatability" standard may broaden as well. If that occurs, there may eventually be substantially fewer limits on the types of disorders the justice system can address. A rehabilitative theory might be precisely what our overburdened system needs.[68] For those who object to the expense of providing such diversionary services to defendants, it is worth noting that, as therapeutic programs and focuses grow, a corresponding drop in the cost of imprisonment due to reduced recidivism will also result.[69] Thus, the idea of MIICs, and of problem-solving courts in general, is one that can appeal to many ideological perspectives.

[64] Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 592–96 (2007).

[65] Faraci, *supra* note 12, at 838–39. *But see* Greg Berman, Comment, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 41 AM. CRIM. L. REV. 1313, 1314 (2004) (theorizing that inattention to due process in MHCs and other problem-solving courts may instead be endemic to the broader criminal justice system, and could in fact be lessened in the MHCs by the increased scrutiny brought about by their experimental natures).

[66] *See* BROOKLYN EVALUATION, *supra* note 30, at 39–42; NEISWENDER, *supra* note 29, at 9–10.

[67] *See supra* p. 1173.

[68] For a discussion on MHCs' potential to ease judicial strain, see sources cited *supra* note 31.

[69] *See, e.g.*, M. SUSAN RIDGELY ET AL., RAND, JUSTICE, TREATMENT, AND COST: AN EVALUATION OF THE FISCAL IMPACT OF ALLEGHENY COUNTY MENTAL HEALTH COURT 33 (2007) (noting that "over the longer term, the MHC program may actually result in net savings to government, to the extent that MHC participation . . . [reduces] criminal recidivism"), *available at* http://www.rand.org/pubs/technical_reports/2007/RAND_TR439.pdf.

Both opponents and proponents of a therapeutic approach to criminal justice agree: for good or ill, the trend toward problem-solving courts is increasing, and is fundamentally changing the way we think about justice.[70] No longer are courts solely places where punishment is meted out. Instead, some now employ holistic solutions aimed at solving the problem of the mentally ill misdemeanant recidivist before it truly begins. Far from punishing people who commit crimes because of their illness, MIICs provide treatment for mentally ill individuals who otherwise would not have access to (or realize their need for) therapy. MIICs also decrease the overall amount of money being spent on imprisonment, thus allaying taxpayers' concerns. Furthermore, the statistics show dramatic drops in recidivism for those who complete the programs, indicating that MIICs are achieving positive results both for the criminal justice system and for the mentally ill individuals they endeavor to help.

Many problems with MIICs remain to be solved, such as the disposition of violent but untreatable mentally ill offenders and others for whom rehabilitation would not be effective. However, it seems reasonable that the criminal justice system is beginning to trend toward a more rehabilitative focus for misdemeanants, and possibly for felons as well. If the problem-solving court experiment succeeds and becomes widely accepted, what might the next step be? If the emphasis is truly on rehabilitation, evidence suggests the potential usefulness of educational courts for young adult offenders, lifestyle-altering programs for interested inmates,[71] or other (even more controversial) programs[72] targeting specified communities that might be effectively rehabilitated. As medical and psychological understanding increases, the boundaries of realistic rehabilitation are pushed ever outward. Such considerations will continue to drive judges, legislatures, attorneys, and voters as the struggle to define the modern criminal justice system continues.

VII. VOTING RIGHTS AND THE MENTALLY INCAPACITATED

During a 1988 subcommittee hearing in the House of Representatives on the Americans with Disabilities Act, the chairwoman of the Rhode Island Governor's Commission on the Handicapped testified:

[70] *See, e.g.*, Williams, *supra* note 64, at 642 ("[T]he goal is to extend therapeutic techniques to the entire judicial system based upon the belief that the role of judges has changed from that of a dispassionate, disinterested magistrate to the role of a sensitive, caring counselor.").

[71] *See, e.g.*, Glenn D. Walters, *Recidivism in Released Lifestyle Change Program Participants*, 32 CRIM. JUST. & BEHAV. 50, 58 (2005) (noting a fifteen-percent recidivism reduction for program participants).

[72] For example, faith-based prisons such as Prison Fellowship's Carol Vance Unit in Texas. *See* The InnerChange Freedom Initiative, Program Details: Texas, http://www.ifiprison.org/generic.asp?ID=977 (last visited Jan. 12, 2008).

> I spoke to one of the social workers who came to me and explained to me that in the group homes, the people who were running the group homes . . . were deciding who they deemed competent to vote and who they deemed not competent. They were not telling all the people about this opportunity to be registered.[1]

Such arbitrary methods for deciding who gets to vote seem antithetical to the idea of a democracy, where all who are able should have a voice in the election of their leaders. However, the legitimacy of excluding certain citizens from voting because of their mental status has rarely been discussed or debated with any rigor. Federal law leaves the whole practice of disenfranchisement of the mentally incapacitated to the states, simply stating, "[T]he name of a registrant may not be removed from the official list of eligible voters except . . . as provided by State law, by reason of criminal conviction or mental incapacity."[2] Pursuant to this law, over forty states have constitutional or statutory provisions that disenfranchise the mentally disabled. In defining which people with mental disabilities lose their right to vote, most states use terminology that is vague, inconsistent, or outdated, and most do not directly address the capacity to vote. Instead, they use some proxy classification for disenfranchisement.

Fortunately, developments in the law of elections and of disability rights suggest that states may be reversing course on the arbitrary disenfranchisement of mentally incapacitated persons. Several states have reformed their disenfranchisement provisions, although these reforms are inconsistent and often not sufficiently comprehensive. A couple of federal cases have held that governments must provide fair access to voting or other "fundamental rights" of the disabled, and if there is not fair access, that individuals have a cause of action against the state. By capitalizing on the reasoning of these decisions, advocates for the disabled may be able to gain even more ground for the enfranchisement of the mentally incapacitated.

[1] *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing of the Subcomm. on Select Educ. of the Comm. on Educ. and Labor, H.R.*, 100th Cong. 189 (1989) (statement of Nancy Husted-Jensen, Chairwoman, Governor's Comm'n on the Handicapped, Providence, R.I.).

[2] National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a)(3), (a)(3)(B) (2000). This Part will use the term "mentally incapacitated" to refer to those with such severe mental disorders that they may be subject to some form of civil rights limitation, such as being placed under guardianship. This reference includes both the mentally ill and those incapacitated for other reasons, such as mental retardation.

A. The State of States' Laws

As of 2000, forty-four states disenfranchised the mentally incompetent, most often through their state constitutions.[3] Only a few of them did this through narrow statutory provisions tailored directly to voting capacity. Instead, nine states simply disenfranchised those under guardianship.[4] Fifteen used outdated language that "restrict[ed] voting by 'idiots,' the 'insane,' or 'lunatics.'"[5] Even those few that dealt directly with the capacity to vote did not generally identify any standard by which that capacity should be measured before the franchise is revoked.[6]

Granted, states have a compelling interest in ensuring that voters understand the election process at least well enough to make an independent choice about whom to vote for.[7] States also have an interest in minimizing abuses of the system that arise through voter fraud from caregivers and absentee ballot systems used by the mentally incapaci-

[3] Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 439, 456 tbl.2 (2000).

[4] *See* Kingshuk K. Roy, Note, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109, 116 n.46 (2003) (listing ten statutes). An opinion of the Attorney General of Alaska, which states that disenfranchisement must be determined in a separate proceeding, qualifies as a narrowly tailored provision that limited the state's broad statute. *See infra* note 19. Guardianship is an involuntary procedure by which a person is deemed incapable of making day-to-day decisions and is either put into a group home run by the state or put under the authority of another person who "assumes the power to make decisions about the ward's person or property." BLACK'S LAW DICTIONARY 726 (8th ed. 2004) (defining "guardianship").

[5] Paul S. Appelbaum, *"I Vote. I Count": Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVICES 849, 849 (2000).

[6] Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 J. AM. MED. ASS'N 1345, 1346 (2004). By 2004, ten states had statutes that specifically addressed voting capacity: California, Connecticut, Florida, Hawaii, Iowa, Massachusetts, New Mexico, Ohio, Oregon, and Wisconsin. *See id.*; Kay Schriner & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 485 (2001).

[7] That this is a compelling state interest with respect to strict scrutiny review seems to be almost universally accepted by disability rights advocates and other interested parties. *See, e.g.*, Henry G. Watkins, The Right To Vote of Persons Under Guardianship — Limited and Otherwise (Ariz. Ctr. for Disability Law, Oct. 11, 2006), *available at* http://acdl.com/GUARDIANSHIP%20AND%20VOTING.htm (noting without comment that "those incapable of exercising the right to vote may be declared ineligible"); *see also* Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001) ("Additionally, for purposes of summary judgment, the parties agree that Maine has a compelling state interest in ensuring that 'those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.'"). *But see* Roy, *supra* note 4, at 117–18 (noting that "there are many uninformed voters who will vote . . . without exercising what most people would consider amounts to reasonable judgment" and claiming therefore that laws that discriminate against the mentally incapacitated are "either grossly underinclusive or simply discriminatory").

tated.[8] However, those state interests do not overcome the fact that not all those who are deemed mentally incapacitated in general are specifically incompetent to vote.

Equal access to voting is a fundamental constitutional right,[9] and therefore voting rights of an otherwise qualified adult should not be denied except as the narrowly tailored consequence of a compelling state interest.[10] It seems almost a tautology, but those who can vote should be allowed to, and those who cannot should not. However, the prevalent methods of removing voting rights do not determine effectively or fairly the capacity *to vote* — the only capacity relevant either to the individual's fundamental right or the state's interest in fair elections. Rather, most states make disenfranchisement decisions by proxy variables, such as guardianship or being deemed generally incompetent. Their current procedures have been severely criticized in both the legal and medical communities.[11] The main point these advocates make is that the right to vote should not be denied categorically on the basis of some general classification of mental disability, such as a definition of "mental incapacity" adopted by a probate court.[12] If a person has opinions about and can understand voting, that person should be allowed to vote, even if he does not have the capacity to carry out other parts of his life independently.[13]

In response to this advocacy, states slowly have begun to tailor disenfranchisement more narrowly to the real capacities of their citizens. One broad innovation distinguishes between different levels of mental capacity in the context of guardianship by creating a lesser classifica-

[8] *See* Karlawish et al., *supra* note 6, at 1347–48.

[9] *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

[10] *See* Dunn v. Blumstein, 405 U.S. 330, 336–37 (1972).

[11] *See, e.g.*, ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 293 & 324 nn.50–51 (1996) (arguing that the constitutional right to vote should apply to institutionalized persons); Appelbaum, *supra* note 5, at 849 (describing criticism of state disenfranchisement laws); Karlawish et al., *supra* note 6, at 1346–47 (advocating voting procedures that assess decisionmaking ability on a "specific functional capacit[y]" basis); Watkins, *supra* note 7 ("[S]uch a determination [of ineligibility to vote] must be based on an individualized assessment. Any process that denies the right to vote must . . . not extend[] this bar to those who may be capable of voting.").

[12] Professor Karlawish and his coauthors also advocate for a specific determination of voting capacity that is defined by whether the individual understands what voting is and what a vote will mean in that process. *See* Karlawish et al., *supra* note 6, at 1346–47.

[13] Instead, several states lump voting capacity with other mental abilities and treat capacity as an all-or-nothing proposition. *See, e.g.*, Doe v. Rowe, 156 F. Supp. 2d 35, 39 (D. Me. 2001) ("Although [the plaintiff] understood the nature and effect of voting such that she could make an individual decision regarding the candidates and questions on the ballot, the Maine Constitution prohibited Jane Doe from voting because she was under guardianship by reason of mental illness."); *id.* at 39–41 (describing similar mental capacities for the other plaintiffs).

tion called limited guardianship, whereby a person is deemed incapacitated and put under guardianship with respect to some rights but not others. Almost all states offer this type of guardianship,[14] though many older state disenfranchisement provisions do not directly deal with the distinction between full and limited guardianship.[15] In response to this discrepancy, state courts have attempted to use the notion of limited guardianship to cabin disenfranchisement provisions, finding that rules removing voting rights from individuals under guardianship refer only to those under full guardianship.

But the introduction of limited guardianship does not completely remove the problem of overbroad denials of the right to vote. Courts still impose full guardianships for a myriad of reasons, which means that some people who understand voting and have opinions on which to base a vote might be denied the right to vote for simply falling on the wrong side of the line between limited and full guardianship. As noted by the federal district court in *Doe v. Rowe*,[16] denying voting rights to all mentally incapacitated people under full guardianship could still result in unjustified removals of voting rights: "For example, a person placed under guardianship for an eating disorder could be disenfranchised because they are, in fact, considered to be suffering from a form of mental illness."[17]

More substantial reform has occurred in the context of laws specifically dealing with voting incapacity, as some states have worked to remove over- and underinclusive terminology from their laws.[18] In the 1990s, Alaska and California determined that courts must make individual determinations about voting capacity before disenfranchising anyone.[19] In 2003, Minnesota changed its law from one automatically

[14] John W. Parry & Sally Balch Hurme, *Guardianship Monitoring and Enforcement Nationwide*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 304, 304 (1991).

[15] Watkins, *supra* note 7.

[16] 156 F. Supp. 2d 35.

[17] *Id.* at 55. Even when a probate court tries to prevent improper disenfranchisement, broad statutes or constitutional provisions can still cause problems. In *Missouri Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007), a man under full guardianship was mistakenly prevented from voting because of Missouri's constitutional provision even though his guardianship order expressly allowed him to vote. *Id.* at 811.

[18] *See* TRANSITION ELECTION WORK GROUP, OFFICE OF THE MARYLAND GOVERNOR, ELECTION WORK GROUP REPORT 14 (2007), *available at* http://www.governor.maryland.gov/documents/transition/Elections.pdf. Indeed, in *Doe v. Rowe*, the court noted that the very election in which the plaintiffs had been barred from voting included a ballot question asking, "Do you favor amending the Constitution of Maine to end discrimination against persons under guardianship for mental illness for the purpose of voting?," which failed. 156 F. Supp. 2d at 38 n.3.

[19] These two states' reforms occurred in 1992 and 1990, respectively. *See* 1992 Alaska Op. Att'y Gen. No. 123, 1992 Alaska AG LEXIS 74, at *3 (Aug. 28, 1992); Act of May 1, 1990, ch. 79, sec. 14, § 1910, 1990 Cal. Stat. 458, 549 (codified as amended at CAL. PROB. CODE § 1910 (West 2002)). These states' processes are still imperfect; Alaska's does not outline how that capacity

disenfranchising those under guardianship to one disenfranchising them only after judicial proceedings that specifically revoke their right to vote.[20] In November 2007, New Jersey voters approved amending the state constitution's provision that restricts the right to vote "by deleting the phrase 'idiot or insane person' and providing instead that a 'person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting' shall not enjoy the right of suffrage."[21]

Other states have not fully moved to a narrowly tailored system that assesses a person's capacity to vote, but have at least moved toward less egregious disenfranchisement processes. In 2001, Delaware removed a reference to "idiot[s] and insane person[s]" from its constitution, making the right to vote contingent instead on being "adjudged mentally incompetent."[22] Nevada's voters approved a similar amendment in 2004.[23] These changes may not significantly alter the number of disenfranchised persons, but they signal that those states recognize that the old terminology is vague, offensive, and not narrowly tailored to an individual assessment of competence. Also in 2004, Louisiana made it clear that only those under full guardianship would have their voting rights revoked automatically, rather than anyone under any kind of guardianship,[24] and in 2006, Wisconsin changed its law to give courts the discretion to declare even persons under full guardianship competent to vote.[25]

However, those changes do not do enough, and several other states have yet to change their disenfranchisement clauses and statutes at all. The constitutions of Iowa, Mississippi, and New Mexico still exclude

should be measured, and California's standard measures the ability to fill out a voter registration form, rather than determining a person's true capacity to vote.

[20] Uniform Guardianship and Protective Proceedings Act, ch. 12, art. 1, § 37(c)(8), art. 2, § 2, 2003 Minn. Laws. 116, 140, 166 (codified as amended at MINN. STAT. §§ 524.5-313(c)(8), 201.014(2)(b) (2006)).

[21] S. Con. Res. 134, 212th Leg., 2d Reg. Sess., at 3 (N.J. 2007) (enacted), *available at* http://www.njleg.state.nj.us/2006/Bills/SCR/134_I1.pdf (amending N.J. CONST. art. II, § 1(6)). The ballot measure passed with almost sixty percent of the vote. *See* N.J. Office of the Att'y Gen., Ballot Questions Tally for November 2007 Election, at 4 (Dec. 3, 2007), http://www.nj.gov/oag/elections/2007results/07general-election/07-official-general-election-tallies(pub-ques)-12.3.07.pdf.

[22] Act of May 8, 2001, ch. 99, 73 Del. Laws 591 (amending DEL. CONST. art. V, § 2).

[23] Assemb. J. Res. 3, 2003 Leg., 72nd Sess. (Nev. 2003), 2003 Nev. Stat. 3726 (amending NEV. CONST. art. II, § 1); Nev. Sec'y of State, 2004 Official General Election Results: State Question 7 (Nov. 2, 2004), http://sos.state.nv.us/elections/results/2004General/ElectionSummary.asp (54.3% of voters approved the amendment).

[24] Act of June 25, 2004, No. 575, § 1, 2004 La. Acts 1955, 1955–56 (codified at LA. REV. STAT. ANN. § 18:102 (2004 & Supp. 2007)).

[25] Act of May 10, 2006, No. 387, § 1, 2005 Wis. Sess. Laws 1332, 1333 (codified as amended at WIS. STAT. ANN. § 6.03(1)(a) (West 2004 & Supp. 2007)). Under prior Wisconsin law, courts could preserve the right to vote only for persons under limited guardianships.

"idiots and insane" persons from voting.[26] The Maryland and Massachusetts constitutions refer to guardianship as the only criterion necessary to disenfranchise the mentally disabled.[27] Arkansas even seems to have gone backwards: prior to 2001, voting rights could be denied only with express court approval; since 2001, an incapacitated person under guardianship must receive express court approval to be authorized to vote.[28] In sum, most states still do not recognize the right to vote for those who are mentally incapacitated but who retain the mental ability to vote.

B. Judgments Facilitating Advocacy

With so many states still disenfranchising mentally incompetent or mentally incapacitated people through arbitrary and imprecise methods, advocates are turning to courts to help change state laws. In 2001, the U.S. District Court for the District of Maine ruled that the Maine Constitution violated the Fourteenth Amendment of the U.S. Constitution by "prohibiting voting by persons under guardianship for mental illness."[29] Three years later, the Supreme Court set the stage for further litigation over disenfranchisement provisions by upholding Title II of the Americans with Disabilities Act of 1990[30] (ADA) as a valid exercise of Congress's power to provide a right of action against states (and thereby abrogate state sovereign immunity) when state laws fail to protect "fundamental rights" — a category that may include the right to vote.[31] Analyzed together, these cases form a foundation for constructing new state law that reflects more accurately the protection of voting rights demanded by the Constitution and the ADA.

Leading up to the 2000 elections, three mentally ill Maine women under full guardianship were denied the right to vote.[32] The probate courts that put the women under guardianship did not specifically consider the right to vote as a distinct inquiry in their decision, nor did they notify the women that their right to vote would be automatically suspended when they were put under full guardianship.[33] One of the

[26] IOWA CONST. art. II, § 5; MISS. CONST. art. 12, § 241; N.M. CONST. art. VII, § 1.

[27] *See* MD. CONST. art. I, § 4 ("The General Assembly by law may regulate or prohibit the right to vote of a person . . . under care or guardianship for mental disability."); *see also* MASS. CONST. amend. III (outlining a similar disenfranchisement provision).

[28] *Compare* ARK. CODE ANN. § 28-65-302(a)(1)(E) (2007) (provisions applying before October 2001), *with id.* at (a)(2)(E) (provisions applying after that date).

[29] Doe v. Rowe, 156 F. Supp. 2d 35, 37 (D. Me. 2001).

[30] 42 U.S.C. §§ 12131–12165 (2000).

[31] Tennessee v. Lane, 541 U.S. 509 (2004); *see also* Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV 793, 807 (2005).

[32] *See Doe*, 156 F. Supp. 2d at 39–40.

[33] *See id.* at 39–41.

three women, a thirty-three-year-old with bipolar disorder,[34] sought to regain her right to vote before the election and was granted a modification to her guardianship giving her back that right.[35] The other women were not able to obtain such modifications before the 2000 elections, even though their psychiatrists concluded that they had the mental capacity to vote.[36] After being prohibited from voting, they sued, claiming that the state constitution's disenfranchisement provision violated the Fourteenth Amendment of the U.S. Constitution.[37]

Maine's constitution states that only "persons who are 'under guardianship for reasons of *mental illness*' are prohibited from registering to vote or voting in any election."[38] By the time of litigation, both the plaintiffs and the State realized that much of the case turned on who qualified as mentally ill, since this classification was narrower than that of all the people who are sufficiently incapacitated for whatever reason to be under guardianship. The term "mentally ill" generally includes only people with mental disorders,[39] while incapacitated persons under guardianship in Maine can include anyone "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause except minority to the extent he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person."[40] Realizing that simultaneously prohibiting mentally ill persons under guardianship from voting and allowing persons under guardianship for other reasons (such as mental retardation) to vote was discriminatory, the State posited that "mentally ill" in the Maine Constitution was meant to include all sorts of mental disabilities.[41] The State

[34] "Bipolar disorder is a recurrent mood disorder featuring one or more episodes of mania or mixed episodes of mania and depression." U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 246 (1999) [hereinafter SURGEON GENERAL'S REPORT], *available at* http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c4.pdf.

[35] *Doe*, 156 F. Supp. 2d at 39.

[36] *Id.* at 40–41.

[37] *Id.* at 39.

[38] *Id.* (emphasis added) (quoting ME. CONST. art. 2, § 1). This terminology only entered the Maine Constitution in 1965; prior to that amendment, the Constitution had disenfranchised "paupers and persons under guardianship." *Id.* at 38–39 (internal quotation marks omitted).

[39] According to the Surgeon General, "*Mental illness* is the term that refers collectively to all diagnosable mental disorders. Mental disorders are health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof) associated with distress and/or impaired functioning." SURGEON GENERAL'S REPORT, *supra* note 34, at 5.

[40] *Doe*, 156 F. Supp. 2d at 42 (quoting ME. REV. STAT. ANN. tit. 18-A, § 5-101(1) (1997)) (internal quotation marks omitted).

[41] This argument rested at least partly on the fact that in the 1950s, the Maine legislature had defined "insane person" to "include idiotic, non compos, lunatic or distracted persons," and in 1959 had passed legislation changing the words "insane" and "insanity" to "mentally ill" and "mental illness" throughout Maine's statutes. The State asserted that the 1959 meaning of "men-

argued that this broad definition was incorporated into the Maine Constitution, even though the 1999 Maine Secretary of State's "Guide to Voter Registration Laws and Procedures" stated that "[t]he law does not restrict people under guardianship for reasons other than mental illness from voting."[42] The court admonished the State for trying to define "mental illness" broadly even though there was no indication that the broad definition had ever been the one followed by the State,[43] and proceeded to reject the disenfranchisement provision on two grounds.

First, the court held that the provision violated procedural due process under the Fourteenth Amendment because the practice of probate courts failed to "ensure[] uniformly adequate notice regarding the potential disenfranchising effect of being placed under guardianship."[44] Second, the court held that the provision violated the Equal Protection Clause because guardianship for reasons of mental illness was an inadequate proxy for the capacity to vote.[45] Since voting is a fundamental right, the provision was analyzed under strict scrutiny,[46] and the Court could find no definition of "mentally ill" that would correlate closely enough to the state's interests in fair elections to pass the requirements of the Equal Protection Clause.[47]

While *Doe v. Rowe* outlined the policy and constitutional reasons why a state should disenfranchise a person only after a specific determination of that person's incapacity to vote, most other states' provisions do not have the same problems of inadequate notice or the direct discrimination against the "mentally ill" that gave rise to the constitutional issues in that case. As a result, *Doe v. Rowe* provides only a few states with a strong reason to change their laws. However, in 2004, the Supreme Court's decision in *Tennessee v. Lane*[48] opened the door for litigation in other states by ruling that the abrogation of state sovereign immunity under Title II of the ADA was valid insofar as it applied to cases implicating a fundamental right.[49]

tally ill" included a broad assortment of mental disabilities, and that the same definition would have applied in 1965 when the Maine Constitution was amended to disenfranchise those under guardianship for mental illness. *Id.* at 53.

[42] *Id.* at 44.

[43] *Id.* at 46.

[44] *Id.* at 50.

[45] *Id.* at 54. The class of people "under guardianship for reasons of mental illness" includes plenty of people who have the capacity to vote, and excludes people who are clearly incapable of voting but not under guardianship for reasons of *mental illness*. *Id.* at 55; *see also id.* ("For example, it would be illogical to say that a person who slips into a coma or persistent vegetative state as a result of a physical injury or ailment was 'mentally ill'").

[46] *Id.* at 51.

[47] *Id.* at 56.

[48] 541 U.S. 509 (2004).

[49] *Id.* at 533–34.

Lane involved two paraplegic individuals who were unable to reach courtrooms above the ground floor. George Lane was a criminal defendant who was compelled to appear before the court on the second floor of a county courthouse with no elevator.[50] "At his first appearance, Lane crawled up two flights of stairs to get to the courtroom," but when he returned for a hearing, he refused to crawl or be carried up.[51] He was arrested and jailed for failure to appear.[52] The other plaintiff, Beverly Jones, was a court reporter who had lost work for not being able to access upstairs courtrooms.[53] Both sued under Title II of the ADA, "claim[ing] that they were denied access to, and the services of, the state court system by reason of their disabilities."[54]

From this description, *Lane* seems to have very little to do with voting rights and the mentally incapacitated. However, the case applies to this topic because the Court decided that states' sovereign immunity was properly abrogated by Title II of the ADA,[55] which prohibits discrimination against otherwise qualified persons with disabilities with respect to public works, including any department or instrumentality of a state or local government.[56] The Court ruled that the abrogation was appropriate under the ADA "as applied to the class of cases implicating the fundamental right of access to the courts,"[57] which suggests that Title II actions can now be brought against other discriminatory laws, such as state disenfranchisement provisions, that affect fundamental rights.[58]

Lane is also relevant because for "a case not about voting, it is striking that it mentions voting as an example of a fundamental right covered by the ADA no less than five times."[59] Future litigators can point to the Court's concern about several categories of discrimination other than courtroom access that it weighed in its analysis, including a

[50] *Id.* at 513–14.

[51] *Id.* at 514.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 513.

[55] *See id.* at 533–34.

[56] 42 U.S.C. §§ 12131–12132 (2000).

[57] *See Lane*, 541 U.S. at 533–34.

[58] Indeed, this issue was also litigated in *Doe v. Rowe*, as it was then an open question. The ADA's definition of "qualified individual" requires that the person "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity," 42 U.S.C. § 12131, and in noting that the plaintiffs would have to be qualified individuals under the Act for their claim to succeed, the *Doe* court tacitly conceded that some mentally incapacitated persons would not be eligible to vote. Doe v. Rowe, 156 F. Supp. 2d 35, 58–59 (D. Me. 2001). However, the court declined to define "what level of mental capacity may be considered an 'essential eligibility criteri[on],'" saying instead that whatever that level might be, the past application of the provision by the State had been discriminatory and in violation of the ADA. *Id.* at 59.

[59] Waterstone, *supra* note 31, at 796 & n.15.

"pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting."[60] Though *Lane* focused on the fundamental right to courtroom access, the Court's reasons for protecting that right also apply to voting; as the Court previously determined in *Wesberry v Sanders*,[61] the right to vote is a fundamental right[62] and therefore deserves a heightened level of protection.

The *Lane* Court also provided powerful historical policy arguments for why such protections are necessary, analyzing disability discrimination in general and pointing out a history of discrimination against the mentally incapacitated. Though *Lane* was a case about physical disabilities, the Court's accounts of state-induced discrimination and unequal treatment included discussion of unjustified commitment and the abuse and neglect of persons committed to state mental health facilities, as well as state laws that "categorically disqualify[] 'idiots' from voting" or marrying.[63] The Court found that the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"[64] justified the ADA's requirements. Such reasoning implies that when dealing with a fundamental right, states should be particularly sensitive to the full history of discrimination against the disabled before broadly disenfranchising whole classes of people.

C. What's Next?

As described above, many states still have vague, confusing, or downright discriminatory provisions when providing for the disenfranchisement of the mentally incapacitated. Those statutes and constitutional provisions are unclear about the definitions of "disability," "mental illness," "mental incapacity," and "incapacity to vote." These ideas are all distinct, but are rarely distinguished. Instead, most states simply choose one term or another without definition or explanation. Current state constitutions disenfranchise citizens based on categories ranging from "idiots" and "insane persons,"[65] to those who are not "of a quiet and peaceable behavior,"[66] to those under guardianship,[67] to those who are mentally incompetent[68] or under guardianship because

60 *Lane*, 541 U.S. at 525 (footnotes omitted).

61 376 U.S. 1 (1964).

62 *See id.* at 17.

63 Waterstone, *supra* note 31, at 821 (citing *Lane*, 541 U.S. at 524).

64 *Lane*, 541 U.S. at 528.

65 *See, e.g.*, IOWA CONST. art. II, § 5; MISS. CONST. art. 12, § 241; N.M. CONST. art. VII, § 1.

66 VT. CONST. ch. II, § 42.

67 *E.g.*, MD. CONST. art. I, § 4; MASS. CONST. amend. III.

68 *See, e.g.*, ALA. CONST. art. VIII, § 177(b); N.D. CONST. art. II, § 2; S.C. CONST. art. II, § 7; UTAH CONST. art. IV, § 6; WYO. CONST. art. 6, § 6.

of mental incapacity[69] or adjudicated to be "incapacitated."[70] Even federal law switches back and forth between separating mental and physical disabilities and incapacities and lumping them together.[71] This ambiguity can be discouraging for advocates of voting rights for mentally incapacitated people who nonetheless have the capacity to vote; so many varying definitions mean that states and courts can pick and choose which definitions to use.[72]

After *Doe* and *Lane*, litigation is one possible avenue for changing these laws. The *Lane* decision can extend *Doe* beyond Maine's peculiar constitutional provision by allowing a private right of action for money damages under Title II of the ADA with respect to state violations of fundamental rights.[73] As a result, there is much promise for litigation in other districts in states that still constitutionally or statutorily endorse discrimination against the mentally incapacitated.

Doe's and *Lane*'s reasoning can also be used in legislative, rather than litigious, advocacy. In addition to the medical arguments about why general incapacity does not equal the incapacity to vote, *Doe* provides persuasive arguments about why disenfranchisement should be done on an individual basis. Both cases review the long histories of voting discrimination and discrimination against the disabled, which indicate just how important it is for disenfranchisement provisions to be clearly written and fairly applied in order to prevent further discrimination. In addition, the specter of adverse court rulings may loom large enough to impel some change from state legislatures; as noted above, one could infer from *Lane* that voting is fundamental enough, and past history discriminatory enough, to *require* specific and narrowly tailored procedures for disenfranchising the mentally incapacitated.

69 *See, e.g.*, MO. CONST. art. VIII, § 2.

70 *E.g.*, ARIZ. CONST. art. VII, § 2(C).

71 *Compare* National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a)(3)(B) (2000), *with* Help America Vote Act of 2002, 42 U.S.C. § 15461 (Supp. IV 2004) (directing the Secretary of Health and Human Services to "ensure full participation in the electoral process for individuals with disabilities," a category that presumably includes both physical and mental disabilities).

72 *Cf.* Christina J. Weis, Note, *Why the Help America Vote Act Fails To Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 447–50 (2005) (arguing that the Act's vague (or nonexistent) definition of the disabled voter could lead to underinclusive state protections).

73 Before *Lane*, courts were divided as to whether Title II claims properly abrogated state sovereign immunity. *Compare* Alsbrook v. Maumelle, 184 F.3d 999, 1007–10 (8th Cir. 1999) (en banc) (prohibiting a Title II claim for money damages because of the state's sovereign immunity), *and* Reickenbacker v. Foster, 274 F.3d 974, 985 (5th Cir. 2001) (same), *with* Garcia v. SUNY Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 112 (2d Cir. 2001) (allowing a claim for money damages, albeit only in cases of "discriminatory animus or ill will due to disability"). *Lane* resolved this debate, at least to the extent that the Title II claims implicate fundamental rights. *See, e.g.*, Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277 n.14 (5th Cir. 2005).

Finally, while the varying definitions and justifications for disenfranchisement may at first seem frustrating, that variation suggests that courts' and state legislatures' ideas about disenfranchisement of the mentally disabled are vague and unexplored, and therefore ripe for change. Diligent advocates may be able to convince lawmakers to take lessons learned from the civil rights struggles of one type of disability discrimination and apply them to another. For example, recently realized rights of the physically disabled might be translated into furthering the rights of the mentally disabled. Some states already evaluate both mental and physical disabilities together when informing the public about the right to vote by persons with disabilities.[74] Indeed, *Lane* also lumped mental and physical disabilities together in explaining why the ADA's abrogation of state sovereign immunity was appropriate, suggesting that accommodations and special procedures afforded to the *physically* disabled were justified partly because of the historical injustices against the *mentally* disabled.[75] It seems only fair that if past injustices against the mentally disabled should result in accommodations for the physically disabled, they should also translate into similar accommodations for the mentally disabled. By stressing the importance of making determinations based on capacity to vote rather than general mental capacity or some other proxy for capacity (such as guardianship), advocates may be able to remove the "uncertainty, inconsistency, and apparent confusion"[76] in the interpretation of states' voting laws, allowing states to disenfranchise those who truly lack the mental capacity to vote while ensuring that those who understand voting can vote.

[74] *See, e.g.*, Conn. Office of Prot. & Advocacy for Pers. with Disabilities, Your Rights as a Voter with a Disability (Oct. 31, 2004), http://www.ct.gov/opapd/cwp/view.asp?a=1759&q=284882.

[75] *See* Tennessee v. Lane, 541 U.S. 509, 524–25 (2004).

[76] Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 807 (8th Cir. 2007).